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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1909

No. 50

VICTOR EMANUEL PEREIRA AND EUGENE H. READING, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE [illegible]

FILED [illegible]

FILED [illegible]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 50

VICTOR EMANUEL PEREIRA AND EUGENE H. BRADING, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1] [Caption omitted in printing]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

No. 48729 Criminal

UNITED STATES OF AMERICA,

vs.

VICTOR EMANUEL PEREIRA, alias VICTOR PERRY, and EUGENE H. BRADING, alias JAMES BRADLEY LEE

INDICTMENT—Filed October 3, 1951

First Count

(18 U. S. C. Sec. 1341)

[fol. 2] The Grand Jury Charges:

1. That commencing on or about April 19, 1951, and continuing thereafter until on or about August 11, 1951, Victor Emanuel Pereira, alias Victor Perry, hereinafter called Pereira, and Eugene H. Brading, alias James Bradley Lee, hereinafter called Brading, the two hereinafter referred to as defendants, devised and intended to devise a scheme and artifice to defraud Mrs. Gertrude J. Joyce, hereinafter called victim, and to obtain money and property by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made. Said scheme being to represent, pretend and promise that Victor Emanuel Pereira was obtaining a divorce in Denver, Colorado, and was to receive as a settlement in said proceeding, $48,000.00; that, in addition, the said Victor Emanuel Pereira was a wealthy businessman; that he was a hotel man of wide experience and had an option to buy the Washington Hotel, in Greenville, Texas, for which he was to give $78,000.00; that it was a fine financial proposition and would earn a fine living for them (victim and Pereira) for the rest of their lives; that he needed immediate cash for this purpose and as a result

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thereof victim advanced to him $35,286.78. That Eugene H. Brading was a wealthy Texas oilman with many leases and holdings over Texas, New Mexico and other states; that he was about to close an oil lease in Texas, which would net immediate large profits and that, if victim would lend Victor Emanuel Pereira $5,000.00, Pereira would double his money in the very near future. With this understanding, victim lent defendants $5,000.00. Both defendants [fol. 3] represented that Victor Emanuel Pereira was violently in love with victim, and as a result of said representation, victim was caused to take extended trips over the United States with one or both of the defendants and was induced to marry Victor Emanuel Pereira in Kansas City, Missouri, on the 25th day of May, 1951.

2. On the 15th day of June, 1951, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, and in the jurisdiction of this Court, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, Victor Emanuel Pereira and Eugene H. Brading caused to be placed in an authorized depository for mail matter a letter addressed to the Citizens National Trust & Savings Bank, Los Angeles, California, to be sent and delivered by the Post Office Establishment of the United States.

Second Count

(18 U. S. C. Sec. 1341)

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the 21st day of June, 1951, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, and in the jurisdiction of this Court, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, Victor Emanuel Pereira and Eugene H. Brading caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Gertrude [fol. 4] Joyce Pereira, 401 West 11th Street, Roswell, New Mexico, to be sent and delivered by the Post Office Establishment of the United States.

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Third Count

(18 U. S. C. Sec. 1341)

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the 30th day of April, 1951, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, and in the jurisdiction of this Court, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, Victor Emanuel Pereira and Eugene H. Brading knowingly caused to be delivered by mail to the Post Office Establishment of the United States, according to the direction thereon, a certain letter addressed to the Federal Reserve Bank of Dallas, El Paso Branch, El Paso, Texas.

Fourth Count

(18 U. S. C. Sec. 1341)

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the 25th day of May, 1951, in El Paso County Texas, within the El Paso Division of the Western Dis-[fol. 5] trict of Texas, and in the jurisdiction of this Court, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, Victor Emanuel Pereira and Eugene H. Brading knowingly caused to be delivered by mail by the Post Office Establishment of the United States, according to the direction thereon, a certain letter addressed to the Federal Reserve Bank of Dallas, El Paso Branch, El Paso, Texas.

Fifth Count

(18 U. S. C. Sec. 1341)

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the 2nd day of June, 1951, in El Paso County, Texas, within the El Paso Division of the Western Dis-

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trict of Texas, and in the jurisdiction of this Court, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, Victor Emanuel Pereira and Eugene H. Brading knowingly caused to be delivered by mail by the Post Office Establishment of the United States, according to the direction thereon, a certain letter addressed to the Federal Reserve Bank of Dallas, El Paso Branch, El Paso, Texas.

Sixth Count

(18 U. S. C. Sec. 1341)

[fol. 6] 1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the 4th day of June, 1951, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, and in the jurisdiction of this Court, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, Victor Emanuel Pereira and Eugene H. Brading knowingly caused to be delivered by mail by the Post Office Establishment of the United States, according to the direction thereon, a certain letter addressed to the State National Bank, El Paso, Texas.

Seventh Count

(18 U. S. C. Sec. 1341)

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the 17th day of June, 1951, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, and in the jurisdiction of this Court, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, Victor Emanuel Pereira and Eugene H. Brading knowingly caused to be delivered by mail by the Post Office Establishment of the United States, according to the direction thereon, a certain letter addressed to the State National Bank, El Paso, Texas.

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[fol. 7] Eighth Count

(18 U. S. C. Sec. 1341)

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the 17th day of June, 1951, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, and in the jurisdiction of this Court, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, Victor Emanuel Pereira and Eugene H. Brading knowingly caused to be delivered by mail by the Post Office Establishment of the United States, according to the direction thereon, a certain letter addressed to the State National Bank, El Paso, Texas.

Ninth Count

(18 U. S. C. Sec. 1341)

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the 18th day of June, 1951, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, and in the jurisdiction of this Court, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, Victor Emanuel Pereira and Eugene H. Brading knowingly caused to be delivered by mail by the Post Office Establishment of the United States, according to the direction thereon, a certain letter addressed to [fol. 8] the State National Bank, El Paso, Texas.

Tenth Count

(18 U.S.C. Sec. 2314)

That on or about June 15, 1951, Victor Emanuel Pereira and Eugene H. Brading, with unlawful and fraudulent intent, caused to be transported in interstate commerce, from the City of El Paso, El Paso County, Texas, within the El Paso Division of the Western District of Texas, to the City of Los Angeles, in the State of California, a security

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of the value of more than $5,000.00, to wit, a check drawn by Fewel and Company, Los Angeles, California, dated June 13, 1951, on the Citizens National Trust & Savings Bank of Los Angeles, California, payable to Mrs. Gertrude J. Joyce, 401 West 11th Street, Roswell, New Mexico, in the amount of $35,286.78, indorsed by Mrs. Gertrude J. Joyce and Victor Pereira, and the said Victor Emanuel Pereira and the said Eugene H. Brading well knew said security to have been obtained by fraud.

Eleventh Count

(18 U. S. C. Sec. 371)

That commencing on or about April 19, 1951, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, and continuing thereafter until on or about August 11, 1951, Victor Emanuel Pereira and Eugene H. Brading unlawfully and knowingly conspired to commit the various offenses against the United States [fol. 9] which are fully described and set out in the first ten counts of this indictment, and to effect the objects of their said conspiracy they did the following acts:

1. Each of the overt acts alleged in the preceding ten counts of this indictment, in the respective dates and places alleged therein.

2. On April 19, 1951, Victor Emanuel Pereira and Eugene H. Brading had a conversation with victim and Kathryn Joyner in the Del Norte Hotel, El Paso, Texas.

3. On April 30, 1951, defendants opened an account at the State National Bank, El Paso, Texas, in the name of Victor Pereira.

4. One June 15, 1951, Victor Emanuel Pereira caused victim to indorse a check in the Del Norte Hotel, El Paso, Texas.

A True Bill.

(S.) K. B. Ivey, Foreman of the Grand Jury.

(S.) Charles F. Herring, United States Attorney.
(S.) Francis C. Broaddus, Jr., Assistant U. S. Attorney.

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[fol. 10] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS INDICTMENT—Filed January 10, 1952

Come now the Defendants, Victor Emanuel Pereira and Eugene H. Brading, and move the Court to dismiss the indictment herein upon each of the following grounds:

1. That said indictment does not as a whole, nor does any count thereof state facts sufficient to charge these Defendants, or either of them, with any offense against the laws of the United States:

2. That said indictment, and each and every count thereof is so indefinite, ambiguous and uncertain as not to inform the Defendants, or either of them, of the offenses sought to be charged against them, and said indictment does not contain sufficient, or any, facts, to enable them to prepare for trial or to avail them, or either of them, of any plea of acquittal or conviction in the event they should at a later date be called to answer any other prosecution that might be brought against them for the same facts, which the prosecution seeks to charge or will attempt to prove in the trial of this action.

3. That said indictment is duplicitous in this: That it seeks to charge these Defendants with the substantive offenses of using the mails to defraud, a violation of Section 1341, Title 18 of the United States Code under Counts 1, 2, 3, 4, 5, 6, 7, 8, and 9; and with the substantive offense of violation of the National Stolen Property Act, Section 2314 of Title 18 of the United States Code under Count 10, while in the 11th Count of said indictment it is sought [fol. 11] to charge these Defendants with a conspiracy under Section 371, Title 18 United States Code "to commit the various offenses against the United States which are fully described and set out in the first 10 counts of this indictment."

4. That said indictment is duplicitous in that in single counts it charges, or attempts to charge; (a) Not one single scheme or artifice to defraud, but several schemes and artifices to defraud, (b) A scheme to defraud by the Defendant Pereira in obtaining from his wife, named in said indictment as Gertrude J. Joyce, a sum of money to purchase a

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hotel, whereas, there is also alleged in each such count a separate and distinct scheme to defraud the said Gertrude J. Joyce of a sum of money alleged to have been loaned by her to the Defendants for the purchase of an oil lease.

5. A plurality of offenses is charged and the Defendants are in jeopardy of being convicted and punished more than once for the same act. The prosecution undertakes to carve separate and distinct offenses from one and the same transaction.

6. That the indictment and each count thereof charges Victor Emanuel Pereira with unlawfully acquiring money from Gertrude J. Joyce, when it appears from the indictment that said Defendant and Gertrude J. Joyce were husband and wife, and hence no offense was committed.

[fol. 12] Wherefore, these Defendants pray that said indictment be dismissed and their bonds exonerated.

Fryer & Milstead, by (S.) Coyne Milstead, Attorneys for Defendants.

1-10-52.

(S.) Holvey Williams.

IN UNITED STATES DISTRICT COURT

Transcript of Evidence

CASE CALLED FOR TRIAL

Be it remembered, that on Monday, January 14, A. D. 1952, the above entitled and numbered cause came on for trial at El Paso, Texas, before the Honorable R. E. Thomason, a United States District Judge in and for the Western District of Texas, and a jury; the Government being represented by Holvey Williams, Esq., and Francis Broaddus, Esq., Assistant United States Attorneys, and the defendants by W. H. Fryer, Esq., and Coyne Milstead., Esq., all of El Paso, Texas; during the trial of which cause the following testimony was introduced and proceedings had in connection therewith:

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JURY IMPANELED AND SWORN

A jury was impaneled and sworn.

The Court: Let the defendants be arraigned.

Mr. Williams began reading of the indictment, and before completing reading of the first count thereof:

[fol. 13] Mr. Williams: Your Honor, there is a motion before you which should be passed upon.

RULING OF THE COURT ON MOTION TO DISMISS AND QUASH

The Court: Yes. Let the record show, Mr. Court Reporter, that the motion to dismiss and to quash is overruled as to all counts.

ARRAIGNMENT OF DEFENDANTS AND PLEA OF NOT GUILTY

The defendants were arraigned, and each entered a plea of not guilty on all counts of the indictment, 1 to 11, inclusive.

All witnesses present in the Court room were called, sworn, and placed under the rule at the request of the defendants.

MRS. GERTRUDE J. JOYCE, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

On direct examination.

Questions by Mr. Williams:

Q. You are Mrs. Gertrude J. Joyce?
A. Yes.
Q. You live at Roswell, New Mexico?

Mr. Milstead: In the identify of the witness, the defendant Pereira will urge the objection to any and all evidence offered by or through this witness as to any matter laid in the indictment, or occurring prior to its presentment, on the grounds of lack of competency of the witness, she and [fol. 14] defendant Pereira having married May 25, 1951,

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and were still husband and wife at the time of return of the indictment.

The Court: The objection is overruled.

Mr. Milstead: In the interest of time, may it be stipulated that is in the nature of a continuing objection, and that it is urged to each and every question propounded to the witness?

Mr. Williams: I believe he said prior to May 25th?

Mr. Milstead: That is the date of the marriage.

Mr. Williams: What you are objecting to is this witness testifying prior to May 25th?

Mr. Milstead: We are objecting to all evidence offered by or through this witness because they were married on May 25, 1951, and were still married when the indictment was returned.

Mr. Williams: It is all right with me, Your Honor. It is stipulated they were married May 25th.

[fol. 15] The Court: And the Court will consider the objection a continuing one.

Mr. Williams: Can we stipulate the date of the divorce?

Mr. Milstead: I think they were married May 25, 1951, and were divorced the middle of November.

Mr. Williams: What date in November, do you know?

Mr. Milstead: I don't remember.

Mr. Williams: 16th of November they were divorced.

The Court: All right. It is so stipulated, and the defendant's objection will be a continuing one as to this witness.

Mr. Williams: As stated by him?

The Court: Yes, sir, as well as his objection and motion on account of the incompetency of the witness, being the wife of defendant Pereira, is overruled.

Mr. Milstead: Since we do have stipulated the dates of the marriage and divorce may we have, and may it be con-[fol. 16] sidered as a continuing objection on behalf of defendant Pereira, any testimony coming from this witness as to any transaction between her and the defendant between the date of the marriage and the date of the divorce, on the ground it would be a confidential communication between husband and wife?

Mr. Williams: You will have to pass on those when we get to them.

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The Court: Yes. The Court will pass on the objection during the time mentioned as the testimony develops.

Q. You are Mrs. Gertrude J. Joyce?

A. Yes.

Q. And you live at Roswell, New Mexico?

A. Yes, sir.

Q. How long have you lived there, Mrs. Joyce?

A. Since I was born; February 11, 1896.

Q. I was not going to make you tell that, but it is all right. Do you know the defendants in this case going here by the name of Victor Emanuel Pereira and Eugene H. Brading?

A. I met one of them under the name of James Lee. I never heard of his name being Brading.

Q. The second one there (indicating defendant Brading)?

A. That is James Bradley Lee.

Q. To you?

A. Yes.

Q. And if he is Eugene H. Brading you don't know anything about it?

A. No.

[fol. 17] Q. And Victor Emanuel Pereira, is that the name you knew this man under (indicating defendant Pereira)?

A. I knew him by that name.

Q. Did you ever know him under the name of Victor Perry?

A. No.

Q. Do you remember about April 19, 1951, when you met these people?

A. I remember very well.

Q. Just tell the jury, please, in your own way. I believe your sister—half sister, is she?

A. Half sister.

Q. Kathryn——

A. Joyner.

Q. Kathryn Joyner was with you and you all drove down from Roswell, New Mexico?

A. Roswell, New Mexico.

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Q. And came to the Del Norte Hotel?

A. Yes, sir.

Q. Just tell how and what you did, and what either of them did, and how you met?

A. Well, Kathryn and myself had decided to come to El Paso. Kathryn had a date with a dentist.

Mr. Milstead: We object.

A. I didn't want to come to El Paso that day, and I am sorry I did.

Mr. Milstead: If Your Honor please.

[fol. 18] The Court: Yes. Confine it to this case.

The Witness: Women like to talk, you know.

Q. State how these people met you?

A. I walked in the Del Norte. We drove up in front of the Del Norte. My sister was driving the car, and I walked in to register, and as I walked out James Lee—I didn't know his name—but a dapper young man, very young looking, came up to me and said "My name is James Lee. What is yours?" I said, "Oh, it is Mrs. Joyce." And we walked down the steps together, and he was chatting all the time, and showed me his credentials out of his little billfold, whatever he had; and when we got out to the car the bell hops were there, and he began to hand them dollar bills. He said, "Now, *date* care of these girls.- I said "This is my sister in the car." Kathryn was sitting in the car. I said "We will take the car to the garage." He asked us to go in and have a drink with him in the bar. I said "We must go around to the garage to take our car." When we got to the garage he was waiting for us at the garage. He walked back with us to the hotel. As we got in the hotel he said "I have a friend I want you to meet." And he took me into the Del Norte cocktail lounge, and Mr. Pereira was sitting in there with some very nice people living here in El Paso, and I was introduced to the three of them.

Q. Who were they, if you know?

[fol. 19] Mr. Fryer: If Your Honor please, we object to bringing in the names of respectable people; I don't see it is material.

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The Court: The Court don't see the materiality. Of course, if Pereira was present it is admissible testimony.

The Court: He was present. I see nothing disrespectable about it.

Mr. Fryer: We withdraw our objection.

Q. Do you want me? Mr. and Mrs. Hall. I had never met them before. We chatted. They had met some people in Roswell. They finally excused themselves, and Mr. Pereira and Mr. Lee suggested we all go to Juarez and have dinner, which we did. We went to Juarez and had dinner, and went to some of the night spots, and Mr. Pereira and Mr. Lee were quite nice gentlemen. When we returned to the hotel I told my sister——

Mr. Fryer: We object.

The Court: Yes.

A. How am I going to tell this?

Q. That is the way you met them, isn't it?

A. I met them that way, yes.

Q. What was Mr. Pereira's attitude towards you?

[fol. 20] Mr. Fryer: If Your Honor please.

The Court: Yes. It is not a question of attitude. It is a question of what was said and done now.

A. He was quite delighted to meet me. He told me it was an epoch in his life, and I felt the same way. I thought it was fate that brought us together. He didn't say so much that night. I think I did ask them if they had ever been in Roswell, and they said no. I did ask Mr. Pereira where he was from, and he said Denver, Colorado, that he was in the hotel business there. He mentioned casually he was getting a divorce.

Q. This was on the 19th day of——

A. April.

Q. —April, 1951? Do you remember anything was said or done by either of them the next day?

A. Well, the next day James Lee—Brading, called my sister——

Mr. Fryer: Unless she was present.

The Court: You will have to confine yourself, Mrs. Joyce,

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to what you saw or heard, or said in the presence of th
defendants, one or both, and what they said. That wo
be hearsay in law.

A. We all decided we would go to Juarez again the n
night.

Q. Did you?

[fol. 21] A. Which we did. We danced, we went over
the Tivoli and danced. I think Pereira was making love
me that night; it seems to me that he was.

Q. Next day was it you went to Roswell?

A. No. I believe that was on Thursday I met them, a
I think I finally was expecting—Pereira was pretty ni
I liked him very much and he seemed to like *me* very mu
so he said in a casual way he had said he had some ti
on his hands waiting for this divorce. He had not d
cussed it with me at length, however, at that time,
he said "We might just go up to Roswell with you girl
And I said "Well, would you like to be my house guest
Then next day, about Saturday he said "Do you rea
want us to be house guests?" I said "Maybe you had bet
stay at a hotel," but anyway next day we went to Rosw
and so Mr. Pereira and Mr. Lee became our house gue
When we got to my house he said "I wish I was going
carry you over the threshhold." Let me say it is so ha
for me to tell things I have had in the presence of both
them. Is that it?

The Court: No. Either one.

A. It seems then I had a date to come back to El P
to see a doctor about an allergy I had on my face. In
meantime James Lee had left his car in Roswell.

Q. In going to Roswell you and Pereira went in y
car, did you?

A. We went in my car, yes, and Kathryn drove w
James in his car.

Q. All right. He left his car in Roswell?

[fol. 22] A. This was later. On the way out we stopp
at Nob Hill and had a gorgeous dinner. On the way
went to see Mrs. Sutherland. She could see I was qu
taken up with Mr. Pereira, and he was taken up with
She thought he was very nice. Her husband is my cous

Q. And she lives where?

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A. At Ruidosa.

Q. New Mexico?

A. Yes, sir.

Q. You went by there on your way to Roswell?

A. Yes. Then when we got to Roswell the boys decided to be my house guests. Then I had to go back to El Paso about a week later, and James had left his car, and so Mr. Pereira said he would drive me to El Paso on this matter that I had. When we got to El Paso Lee flies in; but in the meantime—do you want me to tell about him borrowing the money from me, Mr. James Bradley Lee?

Q. Yes, that would be a good time for it.

A. About two days—James had decided—Vic's birthday was on the 3rd of May. He said "We will have a party for old Vic on his birthday." But in the meantime I think there was quite a large wedding in Roswell and we were all invited. In the afternoon when we returned there was a telegram for Mr. Pereira. We were all sitting around my coffee table in my library. He read it, and looked sad, and he said, "This is good, and this is bad." He said, "My divorce will be granted from Ada on the 27th, but I won't receive my money from this liquidation of my property for a month," and he handed the telegram to Kathryn and Lee, and we all read it. I was so glad he was going to get a divorce and be free, and he was happy too. We thought it was fate we had met. Then about a day or so after [fol. 23] that—but does that make any difference?

The Court: You can refresh your memory.

A. The date doesn't make so much difference. Along about that time they had been talking oil business, in fact, Pereira was to get when he received his money, he was going to go in with James in the oil business in a little way, going to have some leases with him. So anyway in a few days after that—I can get you the dates in my book here—James said to me, he said, "You know, I have got some wonderful leases that we can double our money on, but poor old Vic won't get his money."

Q. James is the small one back there (indicating defendant Brading)?

A. Yes.

Q. Vic is this one (indicating defendant Pereira)?

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A. This is Vic (indicating).

Q. All right?

A. Anyway he said "Poor old Vic can't get his money for a month. In the meantime he is going to pass up a wonderful deal." I was in my bed room sitting there reading, and he said "Could you let poor old Vic have some money to go in this lease? You know he will have this money back in thirty days." I said, "How much does he need?" He said "I am going to put up $2,000.00. We will need $7,000.00. If you will let him have $5,000.00." So I said "I am not really in position——"

[fol. 24] Mr. Fryer: If this conversation was in the absence of either defendant it would not be binding.

Q. It is a conversation with one of the defendants?

A. Yes.

Mr. Fryer: That is quite true, but if the other was not present——

The Court: It was not binding as to him. The Court confines it to that.

Mr. Williams: Sir, if they are working on a deal together it is binding on both of them.

The Court: The Court will overrule the objection.

A. Well, anyway, I said "I can borrow the money from the bank. I don't have it in my checking account." I mean I couldn't let them have that money, "But I will borrow it for him." I said "James, are you sure he will pay me back, because I am not really in position to let him have this money?" He said "Sure. I am putting out $2,000.00. Do you think I would if I didn't think I was going to get it back. Vic will have it in thirty days." I was in love with Pereira. I said "I must help him on this deal," although I have never had a man ask me for money. I assumed this was not that kind of man.

[fol. 25] Mr. Fryer: Your Honor,——

The Court: All right. What was said and done.

Q. After James Lee told you Vic would pay you back in thirty days and as to how honest he was, what did you say and what did he say?

A. I wrote a check out for $5,000.00. I also phoned the bank to borrow the money. Then he stayed that day. He

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left the next day though, and then about the following day Mr. Pereira took me to El Paso on this business matter, and James flew into El Paso. I was surprised. Vic came in and said "You know Jimmie is going to meet us here in El Paso. He wants me to sign some leases." He flew in there and we all went to Juarez that night, and drove back in James' car to Roswell, had a good, gay time.

Q. At this time had Pereira talked to you further about his divorce and what he was getting out of it?

A. Yes. He had a telegram stating he was to get $48,000.00 and some odd cents—I have forgotten just what —in thirty days, and I mean he had talked about when he got the money; but he also said he knew I didn't like it because they had borrowed that money from me, and I didn't like it very much, but still I was in love with him.

Q. How long did you stay here in El Paso on that second trip, do you remember?

A. I think a couple of days. We got back to Roswell for the 3rd of May. I think we got back on the 2nd. The birthday was on the 3rd. I had invited some friends in for Vic's birthday party.

[fol. 26] Q. Then I believe a few days after that, on May 3rd, you had your party in Roswell; then what was the deal about you taking a trip to Wichita Falls, and what was said and done between Vice and yourself?

A. Vic said "I have some time until I get my divorce," and he was so in love with me—he acted just exactly like he was in love with me, and I believed it. He said "I think it would be nice if we could take a little trip together and become better acquainted." I said, "I have some relatives and also a friend who is quite a character, whom you will enjoy meeting." So we did. We had a very gay time; every one thought Vic was quite charming.

Mr. Fryer: We object to what every one thought.

The Court: Yes. State what was said and done.

Q. How was that trip financed?

A. Well, of course, just before we got ready to leave that day Vic said—we were all together to take off—he said "Gertrude, we must have a wonderful trip. I find I am

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a little short of money. Could you let me have $1,000.00?" I said, "Well, I don't know." Of course, we were all ready to leave, and it was going to be so much fun to take the trip, but I was reluctant to write a check and send it down to the First National Bank, as I am so well known down there. I said, "Well, I will call in my neighbor that I had there. I will have him take it down and get the money." Which I did. And then Vic went down to the other bank and got $700.00 worth of traveler's checks, and took the [fol. 27] $300.00 in cash evidently. I didn't know that at the time, but that is what happened. And we started on the trip. We went to Wichita Falls. One of my cousins over there is married to a man named Judge Davenport. Everybody was fun; we had a lovely time.

(A Check was marked "G-1").

Q. This instrument marked "G-1", is that a check you gave to your neighbor, Mr. Cox, to go cash?
A. That is it.

Mr. Williams: We offer it in evidence.
The Court: All right. Do you want to pass it around to the jury?
The Check, marked "G-1", is in words and figures as follows:

[fol. 28] EXHIBIT G-1

95-11 May 11, 1951 2 No. 564 95-11 1122.

Roswell, New Mexico, May 11, 1951.

Pay to the order of J. W. Cox $1000.00 One thousand no/100 Dollars.
To the First National Bank of Roswell, Roswell, New Mexico.

(Signed) Gertrude J. Joyce.

(Perforated stamp: 5-11-51 95 Pd. 11.

(Indorsed on back: J. W. Cox.

(Stamped on back: Pay to the order of Any Bank, Banker or Trust Co. All Prior Indorsements Guaranteed May 11

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'51 3002 First National Bank, Roswell, New Mexico. 95-11 3 95-11.

Q. Did you say why you got Mr. Cox to go get this money instead of Vic doing it?

A. Well, I didn't want the people in the bank to know. A lot of people knew we were going to take this trip to Wichita Falls, and I felt I didn't want them to know I was putting this money out, because I just didn't want them to know it. I was embarrassed about it.

Q. And you did go to Wichita Falls and stay a few days? Did James Bradley Lee come there?

A. He came over there on the weekend.

Q. He showed up in Wichita Falls with you?

A. Yes.

[fol. 29] Q. Your sister Kathryn was not on that trip?

A. She wasn't there.

(A Letter was marked "G-2").

Mr. Fryer: We object on the ground it is immaterial. Your Honor.

Mr. Williams: Your Honor, this is a letter written by Vic and by James, both of these people, and are part of the res gestae, and showing how the affair was going on.

The Court: When you and the witness and others refer to Vic you are referring to Pereira, and James or Lee you refer to Brading?

Mr. Williams: Yes, sir. I have identified them.

The Court: Let the record show the objection is overruled.

Q. This instrument marked "G-2", is that a letter that some of you wrote?

A. Yes, I wrote Kathryn a letter.

Q. And the boys did too?

A. The boys added that.

Mr. Williams: We offer this in evidence.

[fol. 30] The Letter, marked "G-2", was read to the jury, and is as follows:

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EXHIBIT G-2

Kemp Hotel

Wichita Falls, Texas.

Hi little gal—thinking of you, having loads of fun but missing you. Have terrific hangover.

SIS.

This is your true love speaking. Hope your Mom received the roses O. K. and that my little chunga is doing O. K. Vic & Gertrude are having the time of their lives. We will have ours later. Drop me a line c/o the Texas Hotel, Ft. Worth, Texas. Miss you and will see you later. Love. Jim.

(Envelope, with six one cent stamps canceled):

Wichita Falls, Tex. May 14, 1130 AM, 1951.

Air-Conditioned
Kemp Hotel

Wichita Falls, Texas.

Kathryn Joyner
Box 38,
Roswell
New Mexico

Q. Then it seems about May 12th, Saturday, James appeared in Wichita Falls, as you have testified?

A. Yes.

[fol. 31] Q. James being the other defendant here? About May 15th then, three days later, did you and Vic take a trip to Dallas?

A. We went to Dallas. Jimmie drove with us to Dallas.

Mr. Fryer: Unless this memorandum was made at the time,—if it was made since that time it would not be admissible.

The Court: The Court is permitting her to refresh her memory, and not to read from it.

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Mr. Fryer: If she got this up in preparation of the trial, and not made at the time of the incidents.

The Court: The witness is using it for the purpose of refreshing her memory, and she knows that she is——

Mr. Fryer: May we question her?

The Court: —not to read anything, but just purely to refresh your memory as to dates.

Mr. Fryer: We will object to that on the ground it was not made at the time of the incidents.

[fol. 32] The Court: The Court will permit her to refresh her memory, and it is confined to that.

Mr. Fryer: There is no showing it was made by her on the typewriter.

The Witness: I made it out and had it typewritten.

Mr. Fryer: Your Honor please, there is second—remote second hand testimony.

The Court: Just for the purpose of refreshing her memory, and the jury is so instructed.

Mr. Fryer: May we ask where it was made?

The Court: No, not at this time. You can refresh your memory as to dates, and that is all, and it is limited to that.

Q. Did you make that up soon after the occurrences?

A. Yes, sir, while I was in bad health.

Mr. Fryer: There is an appeal—not responsive.

The Court: Yes. The jury will disregard the last answer.

[fol. 33] Q. About May 15th did you and Vic go to Dallas; and if so, tell us about it?

A. We drove over to Dallas. I wanted to do some shopping, quite a bit of shopping, because we had decided we would go——

Mr. Fryer: What they decided in the absence of the co-defendant would not be binding on the co-defendant.

The Court: The objection is overruled if there was a conversation between her and defendant Pereira.

Mr. Fryer: I understood the co-defendant was not present. May I ask that?

The Court: No. She said it was a conversation between her and defendant Pereira.

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Mr. Fryer: Yes, that is quite true, but the co-defendant was not present.

The Court: The objection is overruled.

A. He probably was there.

The Court: Just answer the questions you are asked.

[fol. 34] A. We decided we would go to Hot Springs, Arkansas.

Q. You and Vic?

A. Yes.

Q. All right?

A. We stayed in Dallas several days. I had a friend there.

Q. Did Brading drive with you to Dallas?

A. He drove from Wichita Falls to Dallas. We stayed there several days. Jimmie joined us. We went to the Ice Palace, something like that at the Adolphus. This friend of mine went with Jimmie and I went with Vic. Then Vic decided we would go on to Hot Springs, Arkansas.

Q. And did you?

A. Yes. Do you want me to look at that date?

Q. No; let's back up a little. In Wichita Falls or coming down on the road was anything further said about his buying this hotel at Greenville, Texas?

A. He had not talked about buying a hotel then. He had mentioned in a roundabout way he had expected to go back in the hotel business; he had given two of his hotels to Ada in that divorce proceedings, and he intended to go back in the business in the fall maybe, in the meantime he was going to play a little oil with Jimmie.

Q. Was any option shown you?

A. Not at that time.

Mr. Fryer: We object to the questions as leading.

The Court: This question is leading.

[fol. 35] A. Not at that time, no. He was going in the hotel business though in the fall.

Q. Did you and Vic then drive from Dallas to Hot Springs, Arkansas?

A. We went to Hot Springs. In the meantime he had

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mentioned to me that he had a friend in Kansas City who was going to furnish him with a new Cadillac car. He had a Buick car in Denver he was supposed to have at an apartment in Denver, and he told me he had one but this friend—it is difficult to get a Cadillac, and his friend was going to furnish him with a Cadillac; so when we got to Hot Springs, I think about next day, that is where we decided that we would get married. He decided we both knew what we wanted, and there was nothing else to do but get married. He called up this friend in Wichita Falls, Texas, and told her those words, and also called up my aunt in Roswell, who is quite an old lady, and told them we were both in loge, and both knew what we wanted, and we figured we should get married.

Q. Then after you had decided that what did you do and where did you go?

A. Then Jimmie came in one afternoon.

Q. Then Jimmie showed up, the other defendant?

A. Yes, he came.

Q. In Little Rock, Arkansas?

A. No; this is in Hot Springs. And that afternoon Vic went out and met him at the airport, but some way he missed him, and Jimmie came in before he got back. Jimmie was all thrilled; he had a letter from Kathryn. Vic had called Jimmie and told him we were going to get married. He said "You and old Vic are going to get married." Jimmie said, "Vic, you look good. Are you happy? That [fol. 36] is what makes people look good." Vic said, "Gertrude and myself are going to get married. I don't believe I can go on any further with these oil deals. I am going to get a hotel here in East Texas because I must have an income. I can depend on." Jimmie said "The oil business is highly speculative." They talked about their business, and I didn't pay much attention, I was so in love and everything, and so thrilled. My room was across the hall from Vic's. We had traded rooms though because I liked the other best, it was neater. I received one of Vic's phine calls. It was from this friend in Kansas City. I said, "Oh, is this about the Cadillac?" He said "Yes." I said, "Have the operator give you the other room. Vic isn't in this room." Pretty soon I went over

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to Vic's room. I said "Did you get a call from Kansas City about the Cadillac?" He said "Yes," but he looked kind of sad, and he said, "You know, I don't know, I don't believe I can handle that deal until I get that money." I said, "Oh, well, we don't need a new car. They don't give you anything on the old ones. We can use my car on our honeymoon." He said "Don't get that grown. We are in love. We are young."

Mr. Fryer: Your Honor, that would not be binding.

The Court: Yes. This is a serious matter here both to the Government and these defendants. Confine yourself to facts.

A. I mean in my mind I was turning over—I was thinking about this because he had asked me to donate the [fol. 37] money for the car. So I decided well, we might as well have a car. "Well, Vic," I said, "I can let you have the money for a short time, but I must have it back because I couldn't afford to buy this car." He said "You will get the money back, you know, and then some." So he phoned his friend in Kansas City, and we decided then we would *to* to Kansas City and get married. That would be just be fun. Jimmie was there, and I asked Jimmie if he would drive my car back to Roswell. That was a nice arrangement.

Q. How did you go to Kansas City?

A. We went on the plane. Jimmie took us in my car, and we went up on the night plane.

Q. Did you go to Kansas City on the plane?

A. Yes.

Q. Did you there get married?

A. We got married there on the 25th of May.

Q. Do you remember the Judge's name that married you?

A. It was a funny name. I can't remember it.

Q. Louis Mazuch, or something like that?

A. Yes, something—I never could pronounce it.

Q. Did you have friends in Kansas City?

A. Yes, I had some very nice friends in Kansas City.

Q. Did they all attend the wedding?

A. They all attended the wedding. And Vic excused his friends, saying he didn't think they would fit in, or

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something, one of the wives probably wouldn't fit in. He liked the man friend but didn't like the wife, or something. My friends were there, who are very prominent people in Kansas City. We were invited the next day to a cocktail party at their home, and the four of us went—well, several of us went.

[fol. 38] Q. Was Jimmie Brading or Lee, was he there for the wedding?

A. Well, Vic said we must have Kathryn and Jimmie to the wedding. He said "Let's get married on Kathryn's birthday, which was the 25th of May, so we decided on being married. I said Kathryn, I didn't think, could afford to make that trip, and he said, "I am going to give that to Kathryn for a birthday present.

Q. Vic was?

A. Yes, so she could be at our wedding.

Q. Was it before or after the wedding you got the Cadillac?

A. It was a day afterwards. We were married on Friday, and it was on Monday I think after Friday I received the money from the sale of some securities.

(A Check was marked "G-3").

Mr. Milstead: Defendant Pereira will object to the instrument and evidence in connection therewith because it will involve communications between the witness and her husband subsequent to their marriage, and in behalf of Lee *er* object to that.

The Court: What is that in payment from?

Q. What is that check you got from Fewel & Company?

A. $6,956.55. That is for the sale of some stock. The car—can I tell that, about how much the car cost?

Q. You can start.

[fol. 39] Mr. Milstead: We don't want her to express any opinion, and we can't tell—the witness seems to be disposed to.

The Court: If she knows, all right.

Mr. Williams: I will ask the question, Judge.

Q. Did you sell some stock in California to get this money?

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A. Yes, sir.
Q. Is this what it is for?
A. Yes, sir.
Q. And Fewel & Company are your brokers there?
A. Yes.
Q. And that is the check you got?
A. Yes.
Q. What did you do with it?
A. I gave it to Vic. He had a car ready for delivery. The car wouldn't amount to this much. I said, "Vic, I will need the rest of this, I want it in my checking account." He said, "We will settle all of that later."
Q. You indorsed it over to Vic?
A. Yes, right in Kansas City.
Q. What did you give for the Cadillac, do you know?
A. He said it was $4,750.00.
Q. What happened to the rest of the money?
A. I don't know.
Q. Did Vic give it back to you?
A. No.
Q. In other words, he kept it?
A. Yes.

[fol. 40] Mr. Williams: We offer this "G-3".

The Court: Pass it to the jury, and likewise that letter. Anything offered in evidence pass it to them.

The Check, marked "G-3", is in words and figures as follows:

EXHIBIT G-3

Kansas City draft WJD 133774.

Fewel & Co.

No. G 5822.
Los Angeles May 25, 1951

No Protest

18-120 WJD

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Pay to the order of Gertrude J. Joyce Care Hotel Muehlebach 12th and Baltimore, Kansas City, Mo. Exactly $6956 & 55 Cts. $6956.55.

Fewel & Co., (Signed) Edward J. Devine, Al Knowlton.

Citizens National Bank, Head Office 16-11, 457 South Spring Street, Los Angeles.

(Perforated stamp): Paid 5 29 51.

(Indorsed on back:

Gertrude J. Joyce,
Morris Studna,
R. L. Jett,
Victor Pereira.

[fol. 41] (Stamped on back: Pay any Bank or Banker Prior Indorsements Guaranteed May 28, 1951 Baltimore Bank, Kansas City, Missouri Thos. B. Franklin, V-P and Cashier Collection & Exchange. 18 16-11 Teller.

16-11 Teller.

Q. Morris Studna mentioned on that check, do you know who he is?

A. He is a man, Vic's friend who sold him the Cadillac. I met him while I was there, the only friend I met. He called on us two days after we were married. It was on Sunday he called on us. Could I say this? Studna told me about Vic, such nice things.

The Court: No.

Q. In Vic's presence?

A. Yes, they were all there.

The Court: If they were present.

A. He said, "Gertrude, Vic is a fine man, and if you don't get along with him you will never get along with any one, because he has a wonderful disposition.

Q. On or about May 28th now, two or three days after you got the Cadillac, after the marriage, what happened? Did you come back to Roswell right soon?

A. Well, he called up Greenville, Texas, and found out he could buy a hotel at Greenville.

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Q. Did you hear him call?

A. No. He told me he had called up.

[fol. 42] Mr. Milstead: We object to this conversation between husband and wife.

The Court: Objection overruled.

Mr. Milstead: We object in behalf of the defendant Brading. It is hearsay as to him.

The Court: Objection overruled, if she heard the defendant call up and heard the conversation.

A. I didn't hear him call up. He told me he called.

Q. All right, don't say what he said.

The Court: All right. That question is withdrawn.

Q. Was Lee or any one present when he told you about calling?

A. Well, we discussed the hotel. It was discussed in Lee's presence. He was usually around some place.

Q. It was discussed in Lee's presence?

A. Yes.

Q. Then I will ask you to tell what he told you about phoning Greenville about a hotel?

Mr. Milstead: We make the objection.

The Court: She says now both defendants were present. The objection is overruled.

[fol. 43] A. He just said he had found a hotel at Greenville he thought he would be interested in. We planned on driving through Colorado. He said, "Why don't we take Kathryn and Jimmie and drive by Greenville and see the hotel?"

Q. Did you do that?

A. We did that. We saw the hotel. Vic said he thought it would be a wonderful deal. On the way to Dallas he and Jimmie discussed it pro and con. Jimmie said, "Well, Vic, I don't know anything about the hotel business. I am an oil man." Vic was telling about how much money he could make out of it. I saw the hotel. We actually got out and went in to the hotel, and Vic said, "Now, we won't tell them we are looking at it to buy. We will just look at it from an outsider's viewpoint."

Q. So that is what you did?

A. Yes, sir, we did; and we went to Dallas.

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Q. That was the Washington Hotel at Greenville?

A. Yes. He told Jimmie on the way over Greenville was a good hotel town, a stable town. That is what he wanted. Weren't many motels there, and what he could make of this hotel.

Q. Was anything else said and done by Vic about this hotel while in Dallas?

A. Yes. He said, "Gertrude, if you want to go in with me on this hotel——"

Mr. Milstead: We object to this conversation as confidential.

The Court: Yes.

[fol. 44] Mr. Williams: It is still on the same subject.

The Court: Objection is overruled.

A. He said, "Of course, I can get a little, cheap hotel, we won't make so much out of, but if you want to go in with me on this investment I can get this hotel for $78,000.00,"—I think, something like that. I said, "Well, I have some securities I could sell; I am not making a big return off of them. I know you are capable and I trust you, and I can sell those securities." I tried to phone my broker on that then from Dallas, but couldn't get them. We decided to go back to Roswell to attend the military ball, and he said, "Well, when we get back to Roswell you can call your broker. We have plenty of time." He said he had a broker named E. J. Wilson that he was going to Fort Worth to see about this deal. He had not really made up his mind about it until I said I would put up the money. He was gone all way. He got back, and he said, "Well, we have gotten the hotel. I got it for a song, but there is an old man running it for years that wants to get rid of it, and it is a wonderful deal. I have an option on it."

Q. That was about May 28th, wasn't it?

A. I think so. Yes, Monday, the 28th, called Mr. Wilson at Fort Worth.

Mr. Milstead: We will object to this conversation as being confidential between husband and wife, and hearsay as to defendant Brading.

[fol. 45] The Court: Objection overruled.

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Q. You were back in Roswell when they telephoned him on the 28th?

A. Well, we decided that we would go to Mrs. Sutherland's party, and would get a week's extension. We were supposed to take this option up on the 15th of June. We decided we would extend it for a week so we could go to Mrs. Sutherland's party at Ruidosa.

Q. Refresh your memory on those dates there on the second page.

Mr. Fryer: We think the witness should know. She has a typewritten memorandum.

A. I know it all by heart, only I don't remember all the dates.

Q. The exact date they left town?

A. We went over to Roswell on Sunday because the ball was to be on Monday. I think that was the 3rd of June, if I remember correctly. We went over on Sunday so we could attend that ball. I wanted every one to meet Vic.

Q. You were in Dallas along about the 30th day of May, were you not?

A. Yes.

Q. Then when did Vic excuse himself to go to Fort Worth to see about this hotel?

A. That was while we were in Dallas.

Q. That was while you were staying in Dallas?

A. Yes. And he got an option on it. I saw the option. He paid $2,500.00 down, and he called——

[fol. 46] Q. Did he tell you this?

A. I saw it written down, and he called his broker in Denver—I mean his lawyer, to get this money out of this money that was coming to him, and he got $2,500.00 to pay down on this hotel.

Q. Is that what he told you?

A. He told me, and I saw the option written out. It said $2,500.00 he had paid on the option. We were to take it up on the 15th of June, or in a week I guess it was, a week after that, because it was the 15th of June and we got an extension.

Q. About June 2nd you and Vic went back to Roswell, did you?

A. Yes, on Sunday.

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Q. To attend this military ball?

A. Yes.

Q. That was what?

A. On Monday, June 3rd, I think.

Q. About June 11th did Vic call this E. J. Wilson, in your presence, to get an extension on this hotel?

A. Yes.

Q. What was that?

A. He called. I was sitting at my desk writing some letters or something, in my library, and he called E. J. Wilson. I heard the conversation. He said, "I want an extension on that option on that hotel at Greenville, Texas." After he had finished his call he said, "I didn't talk to Mr. Wilson, but I talked to his secretary, but she will let us know." And he said—well, he told her to wire him immediately if the extension would be granted for a week, which would put it June 15th, was the way that was.

Q. Did he get a wire to that effect?

A. No. Next day he didn't hear. I said, "Vic, I think you had better call Mr. Wilson. You haven't got that [fol. 47] confirmation on that extension yet." So I think that afternoon a telegram came granting an extension. Mr. Wilson sent a telegram.

Q. That was about June 13th he got this telegram? About June 15th did you and Vic come back here to El Paso?

A. I had received a check for thirty-five thousand dollars and some odd cents.

Q. Where did you get that from?

A. I sold some securities in Los Angeles to apply on this hotel deal. So we decided we would bank the money in El Paso because Vic had an account here at the State National Bank, I believe, and I decided I didn't want everybody in Roswell to know about this deal, you know, in the bank there; so we banked the money through the El Paso bank.

Q. Did you then get the money from the sale of stock in California?

A. I got a check.

(A Check was marked "G-4".)

BLURRED COPY

Q. This "G-4", is that the check you got from Fewel & Company?

A. Yes, sir.

Q. Thirty-five thousand something dollars?

A. Yes, sir.

Q. What did you do with it?

A. I gave the check to Vic.

Mr. Milstead: We object to this as being confidential communication between husband and wife.

[fol. 48] The Court: The same objection, and the same ruling.

Mr. Milstead: We object as hearsay as to defendant Brading.

The Court: Objection overruled.

A. I gave the check to Vic. He said, "If you are tired and don't want to go to El Paso Kathryn and myself can get up early and go to El Paso. I am going to sign some papers in liquidation of my divorce." The money was in El Paso for that, so he told me.

Q. All right, you and Vic came here to El Paso?

A. Well, I decided I would come with him. In the meantime Mrs. Sutherland had invited us to an anniversary party at Ruidosa. I said, "I will go to El Paso with you and stop at Ruidosa on the way back, and go to the party."

Q. You had given Vic, I believe, this check in Roswell, New Mexico?

A. Yes, sir.

Q. And brought it here?

A. Yes. When I got to the Del Norte Hotel I indorsed it. I wanted to go to the bank, I had never been there, but it was very warm and I didn't go. We ran into some friends, Rufus Spencers, and Vic said "I will take the check over there." He was not gone but a few minutes. I said "Did you get it fixed up?" He said, yes, they were waiting for him.

Mr. Milstead: Is it understood our objection goes to all of this conversation?

[fol. 49] The Court: Yes, the same objection, and the same ruling.

BLEED THROUGH– POOR COPY

Q. Is that your signature (indicating)?
A. Yes.
A. And Vic's?

Mr. Milstead: We have the same objection.
The Court: Objection overruled.
Mr. Williams: We introduce this instrument, "G-4", in evidence.
The Court: That is the check for $35,000.00?
Mr. Williams: Yes, sir.
The Check, marked "G-4", is in words and figures as follows:

EXHIBIT G-4

WJD Fewel & Co. No. G 6216

Los Angeles 6-13-51 MC

Pay to the order of Mrs. Gertrude J. Joyce 401 W. 11th St. Roswell, New Mexico Exactly $35286 & 78 Cts. $35286.78.
(Signed) Fewel & Co., W. R. MacCormack, Edward J. Devine.

[fol. 50] Citizens National Bank, Trust & Savings of Los Angeles.

(Indorsed on back:

Mrs. Gertrude J. Joyce, Victor Pereira.

(Stamped on back): Pay to the order of Any Bank, Bank or Trust Co. For Collection only 37020 Previous Indorsements Guaranteed State National Bank, El Paso, Texas.

(Perforated stamp: Paid 6-15-51.

Q. That was on Friday, the 15th, that you indorsed this check to him?
A. Yes.
Q. In the Del Norte Hotel?
A. Yes.
Q. You went on back to Roswell, did you?
A. No. We went to Ruidosa to attend this anniversary party of Mrs. Sutherland's, and we stayed there the next day I guess. I can't tell any of the details.
Q. Was Jimmie with you here?

BLURRED COPY

A. No, he was not here, but as we got ready to leave Ruidosa on Sunday evening Vic said——

Mr. Fryer: With reference to what he said anyway——
The Court: Wait a minute.
[fol. 51] Mr. Fryer: —could not be binding on the defendant Brading, something that was said by Pereira in Ruidosa.
Mr. Williams: If it is shown the two are working together everything said and done by one, working together, pursuant to the conspiracy charge in this indictment.
The Court: Objection overruled.

A. Jimmie called Vic from Roswell and told him——

Mr. Fryer: She couldn't know who called.
The Court: No. You can only testify what Pereira said.
Mr. Williams: May- she does know.

A. When we got to Roswell Jimmie was there.

Mr. Fryer: If Your Honor please, certainly the witness cannot testify as to what was said from Roswell by somebody; she did not even hear it.
The Court: No. The Court agrees with that, but she can testify what Pereira said.
[fol. 52] Mr. Fryer: That is true.

A. He said, "Jimmie is in Roswell and wants me to drive him to some little town in Texas to pick up some oil leases tomorrow."
Q. That was in Ruidosa?
A. Yes, sir. So we went back to Roswell, and Jimmie was there. What can I tell?
Q. Anything said?
A. When we got there Jimmie said "Well, old Vic, will you drive me to that town and pick up these leases?" We had that Cadillac car, and Jimmie didn't have his car there. Vic said he would take him next day. That night Jimmie was a guest at my home. They decided they wouldn't go until Tuesday, they were all too tired to go to Texas to pick up these oil leases; so next day they stayed around my home and had a bridge game, and so that night Vic told me they were going to leave early next morning and he

BLEED THROUGH– POOR COPY

would be back right after noon, going to leave real early so he would get back that afternoon. So he ran over with me what he owed me, and was going to pay me next day.

Q. Something about you going to Greenville too?

A. Yes. We were going to Greenville. He had made plane reservations for us to go to Greenville Wednesday.

Q. On Saturday, the 15th, he left?

A. Yes. We were to leave for Greenville on the 20th. He made a reservation. I heard him make it over the phone in my bed room. I was convinced we were going to Greenville.

Q. To close the deal on the hotel?

A. Yes.

[fol. 53] Q. Instead on the 19th he and Jimmie went off in your Cadillac?

A. At 5:00 in the morning he came to my room. Jimmie was with him. He said "We are going to pick up these leases. We will be back this afternoon." In fact we were all invited to a party. Jimmie was going to take Kathryn. I said "Vic, you must be back to go to the party because I know you will enjoy it." At 5:00 in the morning they were leaving. He came in my room and told me they were leaving. And I said "How do you get up so early?" He said "I want to be back here right after noon. I don't want to stay away from you." So I was ill——

Q. The two of them left in the Cadillac that had been paid for with your money?

A. Vic kissed me fondly, so sweet. That was the last I ever saw of them.

Q. Or your $35,000.00 either,—have you seen it?

A. No; or any of the rest of it. There was $13,000.00 more besides that. Today is the first time I have laid eyes on them since that morning at 5:00 o'clock on the 19th of June.

Q. 1951?

A. Yes. And I called up the Greenville hotel. I gave them the benefit of the doubt. I thought maybe they drove over there.

Q. Not what they said.

The Court: Yes, the jury will disregard that.

Mr. Williams: She can state what she did.

BLURRED COPY

A. And they said——

[fol. 54] The Court: Not anything they said.

A. I checked on it, but he wasn't there.

Mr. Fryer: She got it in anyway. We move that the jury be instructed to disregard that, and to exclude it.

The Court: All right. The jury will disregard that last remark as excluded by the jury, and you are so instructed.

(A Letter and Envelope were marked "G-5".)

Q. And that was on June 19th at 5:00 o'clock in the morning they left?

A. Yes.

Q. And you had not seen them again until you came into this Court room?

A. That is correct.

Q. On or about June 21st did you get this letter marked "G-5" (indicating)?

A. Yes.

Q. And in it was this letter from Vic, is it? Victor, signed Victor?

A. Signed Victor.

Q. Is that from this defendant here?

A. Yes.

Mr. Milstead: We will object to this as being confidential, during the marriage of husband and wife.

[fol. 55] The Court: Let the Court see the letter.

Mr. Williams: I have not offered the letter, Your Honor. I will offer the envelope of G-5 in evidence.

Mr. Fryer: The same objection.

Q. Did you receive this envelope, with that letter in it, through the mail?

A. Yes.

Q. And it is postmarked El Paso, Texas, June 21st?

A. Yes, sir.

Mr. Milstead: We will object.

The Court: The Court will permit the introduction of the envelope which she said she received through the United States mail, but the letter is not offered, so there is nothing for the Court to pass on about the letter.

The Envelope, marked "G-5", is as follows:

BLEED THROUGH– POOR COPY

EXHIBIT G-5.

Postmarked El Paso, Tex. Jun. 21, 430 PM, 1951

6 cents postage stamp canceled.

Mrs. Gertrude Joyce Pereira
401 West 11th Street
Roswell
New Mexico

Air Mail.

[fol. 56] Q. Is this envelope in Victor's handwriting?
A. It is.
Q. Without saying the exact contents of the letter, but was it concerning this business transaction?

Mr. Milstead: If the Court please.
Mr. Fryer: That gets it in indirectly by the question.
The Court: Anyway the Court sustains the objection.
Mr. Williams: I can ask the question.
Mr. Fryer: No.
The Court: If you are asking concerning the contents of this letter——
Mr. Williams: Is it on a general subject is all I am going to ask her.
The Court: Well, the Court sustains the objection to that.
Mr. Fryer: This envelope is immaterial. We therefore renew our objection to it; it means nothing, it is just an envelope.
[fol. 57] The Court: Well, in view of what happened about the contents of it the Court will reverse himself, and will withdraw that for the time being, until we see. For the time being the jury will disregard the envelope because the letter is not offered. The Court will pass on the letter if it is necessary to do so.
Four Checks were marked "G-6", "G-7", "G-8", and "G-9", respectively.

Q. Mrs. Joyce, I show you Government Exhibit 6, a check dated June 17, given by Mr. Pereira to the Noisy Water Lodge. Do you know what that was for?

BLURRED COPY

A. That was when we stayed up there to the party; we stayed there a couple of nights.

Mr. Milstead: We will object to the exhibit and the evidence offered through the witness with regard to the check, as being immaterial and not having any connection with the alleged scheme.

The Court: What is the materiality?

Mr. Williams: I will have to connect it later.

The Court: Does the witness have personal knowledge——

Mr. Williams: What it was for?

[fol. 58] The Court: —as to what the check was for?

A. Yes.

Mr. Williams: Yes, they stayed at the Lodge, and this check was given for the lodging.

The Court: Objection overruled.

Q. G-7 is one to Joe Losoya for $5.52, and cashed at the First National Bank, Roswell.

A. Joe Losoya is my servant boy. I think I was probably gone down town and he came in and needed this money.

Mr. Milstead: We will object to that testimony, and not being in regard to any part of the scheme alleged.

The Court: Who signed the check?

Mr. Williams: Mr. Pereira, one of the defendants.

Mr. Fryer: This is for a gardener I understood working for her.

A. That is for a gardener working for me.

[fol. 59] Mr. Williams: Paying the bills at home, and a part of the scheme, as I see it. It was mailed here to the bank, one of the mailing counts.

The Court: The objection is overruled.

Q. G-8 is a check to W. D. Horton for $15.00, signed by Mr. Pereira. It is indorsed by Dr. D. E. Snyder. Do you know what that was for?

A. That is at Ruidosa. I was ill and had to have a doctor.

Q. And Mr. Pereira paid the doctor's bill?

A. He paid the bill.

BLEED THROUGH– POOR COPY

Mr. Milstead: We object to that, and the testimony of the witness with regard to the exhibit, and move to strike that testimony for the reason it is immaterial, has no bearing, and is not germane to the scheme charged.

The Court: Inasmuch as Count 11 of the indictment contains a conspiracy charge, the objection is overruled.

Q. And G-9 is a check dated June 4th, cash $200.00 for Mr. Pereira, and cashed at the Roswell bank. Do you know what that was for?

A. I don't know anything about that check.

Mr. Fryer: Your Honor, we certainly object to that.

[fol. 60] The Court: Yes, the Court sustains objection to that. The jury will disregard it.

Mr. Williams: We will introduce 6, 7 and 8 in evidence for the time, and connect them up later.

Mr. Milstead: And on the offer we renew the objection for the reason the checks are immaterial and have no bearing on any count of the indictment.

The Court: In view of the assurance of the District Attorney he will connect it up, I overrule the objection.

Mr. Milstead: Do I understand the Court's ruling just admitted only with respect to the eleventh count of the indictment?

The Court: No; they are admitted as to all of them because Count 11 embraces all counts.

The Checks, marked "G-6", "G-7", and "G-8", are in words and figures as follows:

[fol. 61] EXHIBIT G-6

88-6-1120.

The State National Bank of El Paso

El Paso, Texas, June 17, 1951 No.....

Pay to the order of Noisy Water Lodge $45.03 Forty five and 03/100 Dollars.

(Signed) Victor Pereira.

(Indorsed on back: Pay To the First National Bank of Roswell, Roswell, New Mexico, For Deposit Only, Noisy Water Lodge.

BLURRED COPY

(Stamped on back: 95 11 95 11 Pay to the order of Any Bank, Banker or Trust Co. All prior indorsements guaranteed Jun 13 51 1000 First National Bank, Roswell, New Mexico. 95-11 95-11.

(Another bank stamp, unintelligible).

(Perforated stamp: 6 20 51 88-6.

EXHIBIT G-7

88-6 1120

The State National Bank of El Paso

El Paso, Texas, June 18, 1951 No.....

Pay to the order of Joe Losoya $5.52 Five dollars and 52/100 Dollars.

(Signed) Victor Pereira.

(Indorsed on back: Joe Losoya Pay to The First National Bank Roswell, N. M., or order 25 Central Hardware, Inc. 25.

[fol. 62] 99-11 Pay to the order of Any Bank, Banker or Trust Co. All prior indorsements guaranteed July 2 '51 1003 First National Bank, Roswell, New Mexico. 95-11.

Pay to the order of Any Bank or Banker or through Jul 3 '51 0571 El Paso Clearing House H Prior indorsements guaranteed The State National Bank of El Paso 88-6 El Paso, Texas 88-6.

(Perforated stamp: 7-3-51 88-6.

EXHIBIT G-8

88-6 1120

The State National Bank of El Paso

El Paso, Texas, June 17, 1951 No.....

Pay to the order of W. D. Horton $15.00 Fifteen and 00/100 Dollars.

(Signed) Victor Pereira.

BLEED THROUGH– POOR COPY

(Indorsed on back: W. D. Horton By Dr. D. E. Snyder.

(Bank stamp, unintelligible).

(Stamped on back: Pay to the order of any Bank, Banker or Trust Co. Prior indorsements guaranteed Jun 19 1951 Otero County State Bank 95-105 Alamogordo New Mexico 95-105.

(Perforated stamp: 6-20-51 88-6.

[fol. 63] On Cross-examination.

Questions by Mr. Fryer:

Q. As I understand you, you and your sister Kathryn came to El Paso on the date you have stated, and that your automobile was stopped outside of the Del Norte Hotel, is that correct?

A. We drove up there and parked the car. We didn't park it; we just stopped it to get our bags out.

Q. I will repeat my question. The car was stopped outside of the Del Norte Hotel, is that correct?

A. We stopped to park our bags.

Q. The car was stopped outside of the Del Norte Hotel?

A. We had to stop it to get out and take our bags out.

Q. The car was stopped outside the Del Norte Hotel?

The Court: Just answer.

A. Yes.

Q. Yes, that was the answer. So you went in and registered?

A. Yes.

Q. And as you came out you saw or met a man whom you had never seen before?

A. He was very jolly.

Q. I didn't ask you if he was very jolly. Just answer my question.

The Court: Just answer the question.

[fol. 64] A. Yes.

Q. You met a man whom you had never seen before, and it is this man here (indicating defendant Brading), is that right? And within fifteen minutes—within two min-

BLURRED COPY

utes you had introduced him to your sister, sitting in the automobile in front of the Del Norte Hotel, is that correct?

A. True.

Q. And then within five minutes you were engaged in a drinking bout in the cocktail room of the Del Norte Hotel with another man whom you had never seen before?

A. It was longer than that, because I parked my car at the garage and went upstairs and changed my clothes.

Q. How long would you say?

A. Oh, about an hour.

Q. Within an hour you were engaged in a drinking bout in the Del Norte Hotel with another man you had never seen in your life, is that correct?

A. True.

Q. Then when these parties left whom you met there, the Hall people, without mentioning their initials, within an hour after that you landed over in Juarez with these two strange men, didn't you?

A. I did.

Q. And stayed there pretty late?

A. Pretty late.

Q. And then within twenty-four hours after you met these two strange men—well, I will ask you did they know that you had a home in Roswell?

A. We discussed all of our situation. Vic was from Denver.

Q. Before they met you did they know you had a home in Roswell?

[fol. 65] A. I don't know.

Q. You don't know?

A. I don't know.

Q. You don't know whether they knew you had a home in Roswell, is that the truth?

A. They didn't say they knew I had a home in Roswell.

Q. At all events you say that they suggested that they be your house guests in Rosewll, is that correct?

A. I suggested it first, and then I withdrew my invitation and decided they had better stay at the hotel, but afterwards we just all decided it would be all right for them to be my guests because I wanted them to meet my friends.

BLEED THROUGH– POOR COPY

Q. You say you suggested that they be your house guests, these two men here, is that right?

A. I invited them.

Q. You invited them to be your house guests in Roswell, didn't you?

A. Yes, sir.

Q. And then you say you suggested first they go to a hotel?

A. That was the next day, after we discussed it pro and con, you know.

Q. At all events they went to your house?

A. Yes.

Q. You driving with Mr. Pereira, that is he was driving, or were you driving?

A. I drove part of the way.

Q. Did you stop at Ruidosa on that trip?

A. Yes, we stopped and had dinner there, and then went up to see my cousin at her house.

Q. So on that trip with this strange man you stopped at Ruidosa, didn't you, at Mrs. Sutherland's?

A. For a few minutes; just to introduce the boys.

[fol. 66] Q. Well, you had a drink?

A. No; they were getting ready to go to a party and we didn't have a drink.

Q. You stopped at Ruidosa and saw your friend Eloise?

A. We all went up to her house, Jimmie and Vic and Kathryn.

Q. Then you went to Roswell?

A. Yes, sir.

Q. Went to your home?

A. Yes, sir.

Q. Large home?

A. Not too large; just a nice home.

Q. These two strange men that you had picked up at the Del Norte Hotel stayed there how long?

A. I don't know. I would have to look at my notes. We left there on the 11th of May, went over to Wichita Falls; but in the meantime we came to El Paso. Jimmie wasn't there all the time.

Q. He was gone? He didn't know anything about these things going on?

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A. Oh, yes, he did. He was in a car. He had to go and attend to his oil business.

Q. So he left? You had a friend in Wichita Falls, didn't you?

A. Yes.

Q. But you say that Vic suggested the trip to Wichita Falls?

A. No. He suggested that we take a little trip some place. He said we would go to the Kentucky Derby, but we found out they had already run the derby.

Q. Kind of behind times?

A. Yes, kind of behind times.

[fol. 67] Q. Did he know you had this friend or relative in Wichita Falls?

A. He did not. I discussed her because Vic and Jimmie were——

Q. I didn't ask you that. Did he know that you had this friend or relative in Wichita Falls?

A. I told him that I had, Mrs. Frances E. Nixon; she is about seventy-four years old, and very entertaining.

Q. I didn't ask her name.

Mr. Fryer: I can't stop the witness. She is telling——

A. Judge Davenport, and his wife is my first cousin. They live in Wichita Falls, Texas, and I also had another cousin—oh, his name is Marion. I can't think of his last name now.

Q. At all events did he know before you told him you had relatives in Wichita Falls?

A. I told them we were going to see my relatives and friends there, and we would have a lot of fun. I wanted him to meet them.

Q. You drove from Roswell to Wichita Falls. Where did you stay?

A. Kemp Hotel.

Q. Both of you?

A. Yes.

Q. So you, an unmarried woman, went with this pick-up to Wichita Falls and stayed there how long?

A. Several days. I was registered under my name, and he was registered under his name.

BLEED THROUGH– POOR COPY

Q. Then where did you go to?

A. We went to Dallas.

Q. And you stopped at the Adolphus, didn't you?

[fol. 68] A. Yes. I was registered under the name of Mrs. Charles F. Joyce and he registered under the name of Victor Pereira.

Q. You both were traveling in your automobile?

A. Yes, because his was in Denver.

Q. I didn't ask you that. So you were traveling, an unmarried woman traveling with a man, a pick-up, then went from Wichita Falls to Dallas, and stopped with this pick-up at the Adolphus Hotel for how long?

A. Several days. I did some shopping at Nieman-Marcus and several stores.

Q. You spent considerable money there?

A. Well, I usually spend——

Q. You spent about $3,000.00?

A. How do you know?

Q. Don't question me, madam.

A. I never discussed this. I pay for my clothes.

Mr. Williams: We object.

Mr. Fryer: Withdraw the question.

Q. So from Dallas you went to Kansas City?

A. No. We went to Hot Springs, Arkansas.

Q. And you stayed there and took the baths?

A. No, I didn't take any baths.

Q. Not even one?

A. In the bath tub, yes.

Q. How long did you stay there?

A. Oh, a couple of days.

Q. You and this same man?

A. Yes, sir.

[fol. 69] Q. Did you have connecting apartments there?

A. No, we did not. I had a room on the opposite side of the hall.

Q. All right, then, you left Hot Springs. This is the man you left Roswell with, to whom you were not married, and with whom you went to Wichita Falls, to Dallas, and then Hot Springs, Arkansas, and after you stayed there a few days then you went to Kansas City?

A. We went up there and got married.

BLURRED COPY

Q. Well, you went from Hot Springs, Arkansas, to Kansas City, didn't you?

A. Yes.

Q. Do you remember the conversation that you had with Vic Pereira about you were traveling around together, unmarried, and that maybe it might be better for you to get married?

A. I never suggested marriage. He suggested it, he didn't think it was right that a girl of my station in life should be traveling, although there was——

Q. A girl of your age?

A. Certainly.

Q. You are fifty-six?

A. Almost. Next month I will be fifty-six.

Q. You are old enough to be his mother?

A. He pretended to be forty-five.

Q. Old enough to be his mother? I didn't ask you what he pretended?

A. No, I am not old unless born in Kentucky.

Q. You are about a quarter of a century——

The Court: We won't argue about it.

[fol. 70] A. He is forty-five on the marriage license. He swore to that when you make out a marriage license.

Mr. Fryer: Your Honor please, is there any protection for me?

The Court: Yes, there is. The jury will disregard the last answer.

Mr. Williams: I think that is entirely responsive.

The Court: I don't think so.

Mr. Williams: She explained what he said.

The Court: She said he swore on a marriage license.

Mr. Williams: I see no reason for striking it out.

The Court: All right. The jury will disregard it, and counsel will proceed.

Q. At all events you landed in Kansas City at the Muehleback Hotel, didn't you?

A. Yes.

Q. How long did you stay there before you were married?

A. Well, two or three days.

BLEED THROUGH— POOR COPY

[fol. 71] Q. Did you have separate apartments?

A. We had. I had to do some more shopping. I was going to be a bride, you see, and I wanted some beautiful clothes. We had separate rooms, and I was registered under the name of Mrs. Gertrude Joyce.

Q. In connecting rooms?

A. There was a door between them.

Q. And a bath room between?

A. No, I did not, not a bathroom between. One was on one end and the other was on another.

Q. You fell in the bathtub in that room?

A. Not in that room, no; it was another room.

Q. How long was that before the wedding?

A. Well, that was the night of the wedding, after we had a lot of champagne.

Q. You fell in the bathtub with your wedding gown on?

A. There wasn't any water. I was sitting on the edge of the tub talking to my sister, and there was no water in it. It was one of the big things, and I slipped off, and it was considered a lot of fun. We had had some champagne of course.

Q. Do you remember giving him any hypodermic?

A. I gave him some B-1 shots because he said he was so tired and worn out and felt so bad.

Q. Where did you give them to him?

A. Right here where they always do (indicating).

Q. Took his pants down? That was before you were married, wasn't it?

A. Yes.

Q. He let his pants down? You took some yourself in the same place?

A. I have been taking them a number of years. They [fol. 72] are very good. They were given to me by my doctors.

Q. At all events before you were married he took his pants down and you gave him a shot?

A. B-1, it is a vitamin.

Q. You gave that to him?

A. Yes, because he felt so bad. They build you up. I hate to see anybody feel bad. I am a kind of doctor, you know.

BLURRED COPY

Q. Let me ask you about this phone conversation with reference to the purchase of the Cadillac. That was with a Mr. Studna, wasn't it?

A. With Mr. Studna, yes.

Q. In Kansas City?

A. Yes.

Q. Did you talk to him?

A. I talked to him on the phone several times; then on Sunday he called on us.

Q. Did you talk to him?

A. Yes. He came in, and there were several people there, and he stayed all afternoon.

Q. But you told him you wanted the car?

A. No, I said nothing about the car. He said "Your husband has a beautiful Cadillac car down there."

Q. You were not married then, were you?

A. Oh, yes, we were married Friday, and it was Sunday he called on us.

Q. Wasn't it in Wichita Falls?

A. About what?

Q. About the Cadillac?

A. No. It was in Hot Springs.

Q. You were not married in Hot Springs?

A. No; but Mr. Studna didn't call on us until after we married in Kansas City.

[fol. 73] Q. Haven't you testified you talked to him from Hot Springs?

A. He called up and got the wrong room. I said "Oh, are you calling about the Cadillac?" and he said "Yes".

Q. So the conversation was before you were married, with Studna, in Hot Springs, wasn't it?

A. Well, he called to tell Vic he had a car for him.

Q. I am still asking you the conversation with Studna about the Cadillac was before you were married?

A. Yes.

Q. And while you were in Hot Springs?

A. Just said a few words because he wanted to talk to Vic about a car. He had been talking about he hoped he would get one, but he wasn't sure of it.

Q. So that was before you were married?

A. Yes.

BLEED THROUGH– POOR COPY

Q. You were married in Kansas City, and your sister Kathryn, who is here as a witness, isn't she?

A. Yes.

Q. She flew with the co-defendant James, Jimmie, whatever you call him, from where?

A. From Roswell. They left there in the morning and got in there that evening in time for the wedding.

Q. Do you remember about marriage arrangements between her and Jimmie?

A. Jimmie was making love to her. He wasn't a very ardent lover, not ardent like Vic.

Q. Vic was a very ardent lover?

A. Very ardent.

Q. You responded?

A. I thought I was in love with him.

Q. At all events you left Dallas, then about sixty miles from Dallas you stopped at a town, didn't you?

[fol. 74] A. When was that?

Q. Greenville?

A. That was coming back.

Q. That is what I am talking about, after your marriage?

A. Yes.

Q. And you went through the hotel there?

A. Yes.

Q. And you looked at the lower floor? Do you remember finding out that the rents were $1,400.00 a month?

A. I didn't find out anything about the hotel. Vic said "We will just go in as spectators; we won't let them know we are interested in buying it." But I did go upstairs to the powder room.

Q. He said, "Don't let them know we are interested?"

A. He said they might want a good price for it.

Q. They had showed you what you say was an option of some kind?

A. In Dallas, yes, he had an option.

Q. Through some broker?

A. It was made out, yes, E. J. Wilson.

Q. And that was the paper that you say he showed you?

A. That was in Dallas, yes. After he had gotten the option he went back to Greenville, and went over to see

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Mr. Wilson. When he came back that evening he was all thrilled because he had gotten this hotel at such a bargain.

Q. You say he pretended to be a hotel man?

A. Yes, that is what he told me.

Q. Did you know he had a $100,000.00 hotel in Reno?

[fol. 75] Mr. Williams: It this testimony or isn't it?

Mr. Fryer: We will show it, Your Honor, by a Government witness who has been subpoenaed by the Government.

The Court: All right. Objection overruled.

A. He said he had owned them, but he had given them to his wife Ada in the divorce proceedings. Jimmie said yes.

Q. You know Ada now, don't you?

A. I met her, yes, out in the hall.

Q. She is here, isn't she?

A. Yes.

Q. You met her outside?

A. Yes, sir.

Q. He told you that he was in the hotel business, and that he owned a couple of hotels in Reno, and that is what you say is false in this whole thing?

A. He told me he owned the hotels, and he gave them to Ada, and Jimmie followed him up and said "Old Vic was miserable or unhappy with Ada".

Q. You have stated he represented falsely to you that he was a hotel man, is that correct?

A. I don't know whether he is a hotel man or not.

Q. Don't you say that was false?

Mr. Williams: She doesn't say anything. The grand jury says it.

The Court: You won't argue with the witness anyway.

[fol. 76] Q. Don't you state today in the presence of this jury that this man falsely represented himself to you as a hotel man, in the hotel business?

A. Evidently he did. I wish he had some hotels and would pay me my money back.

Q. Your statement is that this man falsely represented to you he was a hotel man?

A. Evidently he did. If he has some hotels I will be very happy; I will take one of them over.

BLEED THROUGH– POOR COPY

Q. So if he owned a $100,000.00 hotel in Reno and another $40,000.00 hotel in Reno then he didn't misrepresent himself to you as a hotel man?

A. I hope he does own them, and I will take one of them over.

The Court: That is argumentative. Let's stick to the facts and argue later to the jury.

Q. But you stated he falsely, in reference to the Greenville hotel, represented to you that he was a hotel man?

A. No; I thought he was a hotel man.

Q. But you don't think so now?

A. Well, I hope he has some hotels.

Q. I didn't ask you your hopes. But you still believe he was misrepresenting he was a hotel man?

A. Well, everything he told me turned out to be untrue. He told me he was graduated from Pullman, Washington; he told me his people made North California history; he told me he was from an illustrious family in California.

Q. Bankers, didn't he?

A. Yes.

Q. Go ahead, as far as you want?

[fol. 77] A. Everything he told me turned out to be untrue. He told me he was a Lieutenant Commander in the Navy during the war. Over in Wichita Falls he met some boys over there that were in Okinawa, he really made them believe he was right in it. He told me he had one grandfather that was a Mason and another a Catholic, and he could be a Mason, and waited until the Grandfather who was a Catholic would die because he didn't want to make him mad, and he was eligible to be a Mason, and he did expect to be one when he died, it would be a nice thing to affiliate with.

Q. What else?

The Court: I think it is going pretty far afield.

Q. Are you sure he said a Commander?

A. Lieutenant Commander, yes.

Q. Don't you remember he told you that he was in the Maritime Commission?

A. No.

Q. Is this a laughing matter with you, madam?

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A. No. But he told me so many stories the laugh is on me, of course.

Q. He was with the Maritime Commission and had a citation from the battle of Okinawa?

A. He told me he was a Lieutenant Commander.

Q. He told you he was from an illustrious family?

A. Yes, sir.

Q. And his family and father were bankers?

A. All of them bankers.

Q. Did you know his father owned two banks in California?

A. I hope they do. I don't know it.

[fol. 78] Q. You don't know anything about that?

A. He told me that he graduated from Pullman, Washington, University of Washington.

Q. Do you know that he did not?

A. Yes; because I checked on it.

Q. You checked on it?

A. Yes.

Q. So what somebody told you or what you wrote somewhere?

A. I wrote to the Registrar there. He was never heard of there at the University.

Q. You got that through mailing——

The Court: Let's get down to the facts in this case.

Mr. Fryer: The bars seem to be down on hearsay.

The Court: You brought it out.

Mr. Williams: She has not accused him of any false statements; the grand jury accused him.

Mr. Fryer: But the grand jury could not accuse this man if she did not testify to these things, because there must be direct evidence before the grand jury, and you know that.

The Court: All right. Proceed with the cross examination and get through with this witness.

[fol. 79] Q. You know this indictment—well, you wouldn't know that either I don't suppose.

A. This is the first time I was ever in a Court room in my life.

Q. You have not?

BLEED THROUGH– POOR COPY

A. I was never in a Court room in my life.
Q. How many times have you been married?
A. Twice.
Q. How? Three times?
A. Oh, yes, Pereira.
Q. You forgot one, didn't you? You were married to a man named—what was his name, the second marriage?
A. Mr. Charles Joyce.
Q. A very old man?
A. Not too old.
Q. What is too old, in self defense?
A. He was sixty-six when I married him, and a very fine gentlemen, very well preserved.

The Court: We are not going into all the details.
Mr. Fryer: I am going to show her experience, Your Honor.
The Court: She has testified she has had two husbands before this ceremony with Pereira, so we will not go into the details.

Q. Well, you married a sixty-six year old man and went to California?
A. We lived in Roswell a number of years, and we moved to California because of his health.
Q. You got $475,000.00 from him?

[fol. 80] Mr. Williams: That isn't material.
The Court: Yes. That isn't material.
Mr. Williams: Mr. Fryer is testifying.
The Court: Objection sustained. The jury will disregard that.

Q. Is this the first man you have accused of cheating you?
A. Yes, because I never met a man of this type in my life; I didn't know they existed.
Q. Do you know a man named Dickinson?
A. Yes; he is a contractor.
Q. You accused him of stealing $50,000.00?
A. Well, the man committed suicide to pay for his mistakes.

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Mr. Fryer: I asked the question if she accused him of stealing $50,000.00, and she said he committed suicide to pay for his mistakes.

The Court: Go on to the next question.

Q. I will ask you again, you accused that man of robbing you out of $50,000.00, didn't you?

A. That isn't true.

Q. He committed suicide? I am asking you if you didn't accuse him of robbing you out of $50,000.00?

[fol. 81] A. He was building my home. I had advanced him $20,000.00 to build the home. He had built a home for Mr. Joyce and myself in Beverley Hills previous to this. He was a gambler—though I didn't know it, and he went to Las Vegas and lost that money, along with the other company's money, and committed suicide.

Q. So you accused him of taking that money?

A. I didn't accuse him of—until the man paid for it with his life I didn't know anything about it.

Q. At all events——

A. I didn't know he had stolen the money until he was dead.

Q.—that was one man you accused of stealing your money?

A. That is false. You are not telling the truth.

Q. Well, did he steal it?

A. Evidently the poor man gambled it away.

Q. I didn't ask you if he gambled it away?

A. Evidently when he took my money and used it, yes. The man was dead before I knew the money was gone.

Q. He got $20,000.00, and you claim he robbed you?

A. I don't claim anything. The man hadn't one penny left in the world.

Q. You told Pereira all of these things, didn't you?

A. Well, when we are married and in love with each other we have little confidences, yes.

Q. That is how he knew it, isn't it? Didn't you tell him that you went to California with this old man who was confined to a wheel chair?

A. That isn't true, and I don't want to hear anything about Mr. Joyce. I don't see why that has to be brought into this Court.

BLEED THROUGH– POOR COPY

Q. And didn't you tell him——

[fol. 82] A. Mr. Joyce wasn't in a wheel chair, and I have people anyway as a matter of fact that can testify to that.

Q. Didn't you tell this man during the time that you knew him that old man Joyce—how old was he when he died?

A. I was in love with Mr. Joyce and he was in love with me. He was sixty-six when I married him.

Q. Then you were married how long?

A. Ten years. We were very happy.

Q. That was seventy-six?

Do you know Herbert Joyce?

A. He is my step-son, yes.

Q. You know we have subpoenaed him?

A. I don't know what he could say against me. We have been friends. My father brought him into the world. I have known him all of my life.

Q. Do you know he is now in the hospital, today, in Roswell?

A. I am sorry.

Q. Did you know that?

A. No.

Q. At all events didn't you tell Mr. Pereira in this conversation with him that you were a business woman, and that you had gotten some $100,000.00 worth of shares in the Morrow Hardware Company of Amarillo.

A. I am not a business woman. I have a very fine business man who takes care of my business, yes.

Q. You have that interest in that company?

A. Yes, I have that interest in that company.

Q. And you are a director in that company, aren't you?

[fol. 83] A. That is correct.

Q. Well, you told him about that, didn't you?

A. Well, we were married.

Q. I am asking you if you told him that?

A. I told him, yes.

Q. You also told him about other interests you had, and he told you about interests that he had had in Nevada, didn't he?

A. That is right.

Q. And of course you concluded that these statements

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of his with reference to hotels that he owned in Nevada were all false, is that correct?

A. I only know I believed everything he told me until he disappeared; and, of course, I couldn't believe anything then.

Q. Now, you told him all of these matters I have inquired about, about the property that you owned; you told him those things after you were married, didn't you?

A. Yes.

Q. And since your divorce of course you have made up your mind that all of this hotel talk of his was all misrepresentations, haven't you?

A. It seems everything was a misrepresentation.

Q. But in your divorce case in Roswell on November 17th or 16th you never mentioned a single thing about fraud or about misrepresentations or about deceit or about lies to you, did you?

A. The original divorce suit——

Mr. Williams: It is immaterial and irrelevant what the lawyer might have alleged. I see no point going in it further, for the sake of time.

[fol. 84] Mr. Fryer: It is the first time she has had to appear about this case in Roswell.

A. In the original divorce suit those things were brought up.

The Court: Objection overruled.

Q. All you testified to—well, you know the case was in the District Court of Chavez County, don't you?

A. We made all of those accusations, but Pereira denied everyone of them. Then we had a summary judgment.

Q. All you testified to was you lived at 1100 North Kentucky Street in Roswell, New Mexico, and you had lived there for the required length of time, and that Mr. Pereira left on the 19th of June and that you had never seen him since, and that was all you testified to in the divorce case.

A. They made a lot of accusations——

Q. I didn't ask you if they made a lot of accusations.

Mr. Williams: Can't she answer like she wants to?

The Court: She did not draw the pleadings.

BLEED THROUGH– POOR COPY

Mr. Fryer: I am only asking what she testified.
[fol. 85] Mr. Williams: She is going to frame this answer, and not you, if I have anything to do about it.
The Court: You can question her on redirect.
Mr. Fryer: I have no objection to her making an explanation confined to the question.

Q. All you testified to on the 16th of November, 1951, in Roswell, New Mexico, was that Mr. Pereira left at 5:00 in the morning on the 19th of June, said he was going to return at 2:00, and that he has never been back, and that is all you testified to?
A. I don't think I even said that. My lawyer drew it up.
Q. He didn't drawn up your testimony, did he?
A. Well, he discussed it with me. I wanted to get through with Pereira, so my lawyer said if we had a summary judgment——
Q. Do you know Donald Brown?
A. No.
Q. Court reporter up there?
A. No.
Q. Did you testify to another thing in the divorce case against this defendant except he left on that date in June and never came back?

Mr. Williams: That has been answered, and is absolutely immaterial and has nothing to do with this case.
[fol. 86] The Court: Yes. Objection sustained. It has already been answered.
Mr. Fryer: Yes, it has been answered all right.

Q. In Dallas do you recall phoning a lady that you called Red Snapper?
A. Yes, an old, old friend of mine.
Q. What was the nature of her connection with this?
A. How do you mean?
Q. Well, did you call her for Jimmie?
A. No; I called her because I wanted the boys to meet her.
Q. Commonly known by the police there as Red Snapper?
A. No, that isn't true. That was a name we called her many years ago in El Paso when we were all young widows.

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Her husband died. We went over to go with the boys out there. They called her Red Snapper. She was very vivacious. We wanted to go to the ice palace, and Jimmie was there, and I thought it would be nice to have the foursome. Her husband was dead.

Q. That was the foursome, with Red Snapper?

A. Well, the name is Tinsley. Red Snapper was the name we called her many years ago in El Paso. I don't think the police even know her. She is a respected person. I doubt she even knows the police or got a traffic ticket.

Q. You did travel personally with a man to whom you were not married when you went to Sante Fe?

A. Who is that?

[fol. 87] Q. Joyce?

A. Oh, Mr. Joyce. We went up there to get married, yes.

Q. You traveled along the border with him?

A. That was after we were married.

Q. Not before?

A. No. We went to see my sister. Her husband was stationed in Nogales since the World War. He was a Colonel in the regular army down there.

Q. Well, you stopped here at the Cortez Hotel before you married him, didn't you?

A. Oh, yes. Herbert Joyce brought me over here to meet my husband. He called up and said "Why don't you kids come and meet me?"

Q. So you were with the old man?

A. Yes, we all stopped here, Herbert and his dad and myself. Well, he was not really on old man.

Q. In self defense I will say that. As you have stated, your desire was not to let any one in Roswell know about your financial transactions?

A. That is true.

Q. And didn't you tell Mr. Pereira, Victor as you call him, that you didn't want Jimmie to know about that transaction?

A. No, because Jimmie knew. I said "There is no reason for him to know our private affairs."

Q. So you said there was no reason for James Brading,

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or Lee as you call him, to know about these transactions, isn't that correct?

A. Well, that I was putting the money in it. I never did let a man have money before.

Q. Wasn't that statement "Don't let Jimmie know about these transactions"?

A. I said "There is no reason."

[fol. 88] Q. Didn't you state categorically "Don't let Jimmie know about our money transactions"?

A. I didn't say it, not in those words. That isn't what I meant.

Q. In substance and effect?

A. More or less, yes, because I didn't want people to know my affairs that have never been aired before.

Q. Didn't you also state that you didn't want your sister to know?

A. That is right, because I never discussed with her my business affairs.

Q. I didn't ask you about that. You are fairly well educated and understand English?

Mr. Williams: I wish you would quit insinuating she is not answering your questions.

The Court: The question was if she said to not let Brading know about the transactions.

Mr. Williams: She said yes.

Mr. Fryer: I appeal to the record.

That is all.

On re-direct examination.

Questions by Mr. Williams:

Q. Mrs. Joyce, they speak of Herbert Joyce, who is your step son?

A. Yes.

[fol. 89] Q. And have evidently tried to show you were not friendly with him. You are all good friends?

A. Very good friends.

Q. He is interested in this same project with you in Amarillo?

Mr. Fryer: We object, certainly, first the question is leading, and second, if that question is asked I would ask

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for an adjournment to get that man, because I have a telegram he is in the hospital in Roswell, and I can't get him to contradict this.

Mr. Williams: You have tried to throw a terrible light here between this lady and——

The Court: The Court will permit you to prove by this witness the relations.

Q. This step-son is interested in this project with you in Amarillo?

A. Yes, sir. He is handling my proxy in case I am not able to be there Saturday.

Q. You have given him power of attorney to vote your shares?

A. That is right.

Q. Do you know anything about him being sick in a hospital?

A. No.

Mr. Williams: Your Honor, there is some confusion in my mind about this letter.

[fol. 90] The Court: The Court then reversed himself, because you have not offered the letter.

Mr. Williams: Well, I offer the envelope then. Then I offer the letter. I offer the envelope, as I have heretofore, and she has testified she got it through the mail, and it is from Victor Pereira.

The Court: Yes. Is there objection to that?

Mr. Milstead: The objection is that it is immaterial to any issue raised in the indictment without showing the contents.

Mr. Williams: I offer the contents, which is the letter which is also marked "G-5".

Mr. Milstead: The objection made to that is it is a confidential communication made between husband and wife during marriage.

The Court; Objection overruled.

Mr. Milstead: Exception.

[fol. 91] Mr. Williams: Since they object to that, Your Honor, I would like to ask generally, this being a confidential communication, which I must admit it is, but there is some question whether it is admissible or not, rather

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than take a chance and offer the letter, does it relate to this $35,000.00 transaction? Answer yes or no.

Mr. Fryer: That is getting in indirectly what he can't get in directly.

The Court: Since counsel says it is a confidential communication between husband and wife the Court again reverses himself on that, and declines to admit the letter.

Mr. Williams: May I ask her if the general nature of this letter concerns this business transaction of $35,000.00?

The Court: The Court sustains the objection to it.

Mr. Williams: Can't ask her that?

The Court: No; because that is doing indirectly what you decline to do directly, which you admit, so in view of your statement it is a confidential communication between husband and wife the jury is instructed to disregard what was said about it.

[fol. 92] On recross-examination.

Questions by Mr. Fryer:

Q. You state that Herbert Joyce, your step-son, son of the old gentleman, is very friendly with you?

A. Yes.

Q. Was he out in California when you offered that will in evidence that left you everything?

A. Herbert had been provided for.

Q. I haven't asked you that.

Mr. Williams: That is an answer.

The Court: The Court thinks she can first say yes or no.

Mr. Fryer: Yes. I have no objection to an explanation.

Q. Was he out there when you offered that will leaving you $475,000.00 estate, was he there with his lawyer, O. O. Oshburn?

A. Not that I know of. I don't know anything about it. I know Herbert was perfectly satisfied about the provisions made for both of us. We were both well provided for.

Q. You got that estate?

A. No, I didn't; there wasn't too much left after the illness.

Q. You made an affidavit out there that the estate wasn't worth over $50,000.00?

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A. It wasn't worth above that at that time. What does that have to do with this deal? I don't like to air my personal affairs.

[fol. 93] The Court: We are not going to try the affairs of your deceased husband.

Mr. Fryer: I want to show whether or not they are friendly.

Mr. Williams: I didn't bring it in at all.

The Court: Anything further from this witness.

Mr. Fryer: Nothing further.

(Witness excused).

Miss Kathryn Joyner, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

On direct examination.

Questions by Mr. Williams:

Q. You are Miss Kathryn Joyner?

A. Yes.

Q. And you are a half sister, are you, of Gertrude Joyce?

A. Yes, I am.

Q. How are you related?

A. We have the same father.

Q. You live in Roswell?

A. Yes, sir.

[fol. 94] Q. What do you do there?

A. I am a teacher.

Q. You have a kindergarten, do you not?

A. Yes.

Q. Something of that nature?

A. Co-owner of a kindergarten.

Q. You came to El Paso with Mrs. Joyce on April 19, 1951, did you not, in her car?

A. Yes, I did.

Q. Who drove?

A. I did.

Q. When you got to the Del Norte Hotel what did you do?

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A. We drove up in front of the hotel, and Mrs. Joyce went into the hotel to register, and when she returned Mr. Brading, or Mr. Lee, was with her.

Q. What do you know him as?

A. Mr. Lee.

Q. Jimmie Lee?

A. Yes, sir.

Q. When she returned Lee was with her?

A. Yes, sir.

Q. What happened then?

A. And he introduced himself to us and asked us to come in and have a drink in the cocktail lounge. We told him we were very tired. He tipped the bell boys each a dollar. Then we drove around to the garage, and he was waiting at the garage, and asked us to come in and meet a friend of his. So we walked in and met Mr. Pereira and Mr. and Mrs. Hall, I believe it was.

Q. They live here in El Paso?

A. Yes, sir.

Q. I am not going over all of this transaction with you; they may care to. Did quite a courtship start up between Mrs. Joyce and Mr. Pereira?

[fol. 95] A. Yes, sir.

Q. Did Mr. Pereira ever tell you what he thought of Gertrude, or discuss any of that?

A. No. I think he told me he thought she was quite charming. I don't remember what else he said.

Q. They were both of them around you quite a bit after that until about June 19th, when they disappeared?

A. Yes, sir. Mr. Pereira was there all the time, and Mr. Lee just part of the time.

Q. Did Lee ever tell you anything——

Mr. Fryer: If Your Honor please, these questions are leading.

The Court: Yes. Don't lead the witness.

Mr. Williams: I don't believe this is leading:

Q. Did Jimmie Lee ever discuss with you anything about Mr. Pereira's background, and who he was, and what he was?

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Mr. Milstead: Objection; it would be hearsay as to Pereira.

The Court: Objection is overruled.

A. No, sir. I don't remember. Really Mr. Pereira discussed his own business more or less.

Q. Did Mr. Pereira ever tell you, or did you hear him say in his presence, anything about his divorce from Denver?

[fol. 96] A. I did hear him say he was divorced.

Q. What was happening about the divorce proceedings? Do you know what he said there?

A. Later he received a telegram saying that he was to receive a settlement in this divorce.

Q. Do you know how much was in that?

A. About $48,000.00 I believe.

Q. That was in Denver?

A. Yes, sir.

Q. Do you know who from, what the wife's name was?

A. I believe it was Ada.

Q. Did Jimmie Lee, as you know him, propose any love to you?

A. No, not exactly.

Q. Did you and he—or did he discuss with you anything about marriage?

A. Yes, discussed it, but that was all.

Q. You and Jimmie flew to Kansas City, did you?

A. Yes, sir.

Q. To the wedding?

A. Yes, sir.

Q. Where from?

A. Roswell.

Q. What was he doing in Roswell at that time?

A. He returned Mrs. Joyce's car from Hot Springs, Arkansas.

Q. And then the two of you flew up to Kansas City to the wedding?

A. Yes, sir, on the wedding day.

Q. Did the four of you then come back in the car to Dallas?

A. To Dallas, yes, sir.

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Q. To Dallas?
A. Yes, sir.
[fol. 97] Q. On the way did you see or hear anything about a hotel?
A. We stopped at Greenville, and Mr. Pereira said he had looked at the Washington Hotel in Greenville, Texas, to lease.

On cross-examination.

Questions by Mr. Fryer:

Q. Did your sister, Mrs. Joyce, ever say anything to you about these financial transactions?
A. No, sir.
Q. That is all.

(Witness excused).

* * * * * * * * * *

JOHN B. GOODMAN, JR., a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

On direct examination.

Questions by Mr. Williams:

Q. What is your name, please?
A. John B. Goodman, Jr.
Q. And your business?
A. I am Clerk of the District Court of the Second Judicial District, City and County of Denver, State of Colorado.
Q. Does your office keep the divorce records of all of Denver?
[fol. 98] A. No, sir. There is one other Court that has jurisdiction of divorce cases, and that is the County Court.
Q. That gentleman is here too, is he not?
A. I haven't seen him. I do not know whether he is in the city or not.

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Q. Mr. Miller?

A. Mr. Miller, yes, sir, he is the Clerk of the County Court.

Q. You have not seen him here?

A. No, sir.

Q. Well, I will ask you then have you searched your records to see whether or not Victor Pereira had a divorce action pending in your Court during the year 1951, at any time?

A. I have.

Q. Did such appear there?

A. No, sir.

Mr. Williams: You can have the witness.

On cross-examination.

Questions by Mr. Fryer:

Q. What year did you search?

A. The last search I made was last Wednesday, January 9th.

Q. I mean for what time?

A. From 1945 up to and including January 9, 1952.

Q. That was as far back as you went?

A. Back as far as 1945, yes.

Q. All right, that is all.

(Witness excused).

[fol. 99] E. V. Thompson, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

On direct examination.

Questions by Mr. Williams:

Q. You are Mr. E. V. Thompson?

A. I am.

Q. Manager of the Western Union at Denver?

A. I am.

Q. Do you have with you the record of a telegram there?

A. I do.

Q. Sent by some one named Curtis to Victor E. Pereira, 401 West 11th Street, Roswell, New Mexico?

The Court: Pass it to counsel.

Mr. Fryer: If the Court please, I want to see it before you get the contents in.

Mr. Williams: You are going to see it.

A Telegram was marked "G-10", and handed to counsel for defendants.

Mr. Fryer: We object to this telegram, Your Honor, on the ground there is no connection shown between either of the defendants and the sender, whoever the sender might be. It is hearsay, immaterial and irrelevant, prejudicial, [fol. 100] and shows no connection between either one of these defendants.

The Court: Pass it to the Clerk, and the Clerk will pass it to the Court. What is the materiality?

Mr. Williams: It is concerning this hotel they have been talking about, basis of the indictment. We will connect it up.

The Court: You will connect it up?

Mr. Williams: Yes, sir, very abruptly.

The Court: All right. The objection is overruled.

Q. This is "G-10", and this is a record of your Western Union office in Denver, and this is a telegram that was sent through your office, is it?

A. Yes, sir, it is.

Q. Addressed as shown on its face?

A. Yes, sir.

Q. What is the date? It is sent April 24th?

A. April 24, 1951, 11:56 A. M.

Mr. Williams: We offer this in evidence.

Mr. Fryer: We make the same objections, Your Honor.

[fol. 101] The Court: The objection is overruled.

The Telegram, marked "G-10", is in words and figures as follows:

EXHIBIT G-10

1951 Apr 24 AM 11 57

177 44/221

Western Union

No. Wds. C. L. of SVC. 27.
Pd. or Coll. PD.
Cash No. VC 7 A L.
Charge to the account of 189.
Time filed Apr 24 AM 1156.

Send the following message, subject to the terms on back hereof, which are hereby agreed to To Mr. Victor E. Pereira. PM 12 08 April 24 1951.
Street and No. 401 West 11th Street,
Care of or Apt. No. Gertrude Joyce Place Roswell, New Mexico.

Your net figure in property settlement 48,895.00 Distribution will be made May 25th. Finale divorce effective [fol. 102] April 28th Best personal regards. Hope to see you soon.

CURTIS

Dupe. #7 used 221-MDR.
177 Skeleton in Files.
Denver Accounting Center JPS 11-16 Clerk.

The Court: Was that telegram actually transmitted over your lines?

The Witness: It was.

The Court: From Denver to Pereira at Roswell, New Mexico?

The Witness: It was.

Mr. Fryer: In connection with our objection to the telegram, Your Honor, Your Honor will recall that counsel asked Mrs. Joyce about a telgram from Denver that was signed by Ada. We object to this telegram.

The Court: He said he expects to connect it up.

Mr. Williams: I am sure Mr. Fryer is mistaken. I have

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never asked about any telegram from Ada, because I don't think there is one.

[fol. 103] Mr. Fryer: I recall very distinctly. That is all.

(Witness excused).

J. Tipp Newell, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

On direct examination.

Questions by Mr. Williams:

Q. What is your name, please?

A. J. Tipp Newell.

Q. And your business?

A. Hotel business.

Q. Do you know who owned the Greenville, Washington Hotel at Greenville, Texas?

A. At the present time Newbell Hotel Company, Incorporated.

Q. Are you connected with that company?

A. Secretary and General Manager.

Q. Do you know whether in June, 1951, that hotel was for sale or not?

A. It was not.

Q. Do you know Mr. Victor Pereira, the man sitting here (indicating defendant Pereira)?

A. No, sir.

Q. Did he or anybody for him ever approach you about buying that hotel or obtaining any options to buy it, in May or June, 1951?

A. No, sir.

[fol. 104] The Court: Do you reside there in the Washington Hotel?

The Witness: No, sir. I live in Sherman, Judge.

The Court: But you are about Greenville, the local resident manager?

The Witness: No, sir. I have no connection with the management of the hotel. The hotel is under lease to other parties.

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On cross-examination.

Questions by Mr. Fryer:

Q. Are you owner of the corpus of the hotel or of the lease?

A. No, sir. We own the hotel, the real estate. We have no connection with the lease.

Q. Do you know if the lease holder had it listed in Dallas with a broker?

A. The leaseholder? I do not.

Q. That is all.

(Witness excused).

ROBERT BROWN GIBSON, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

On direct examination.

Questions by Mr. Williams:

Q. What is your name?

A. Robert Brown Gibson.

[fol. 105] Q. And you live in Denver?

A. Yes, sir.

Q. How long have you lived there?

A. In the city limits?

Q. Well, just how long has Denver been your home?

A. Oh, about two or three years.

Q. Do you know Victor Pereira, the defendant sitting here?

A. Yes, sir.

Q. Along a little before April 24th of 1951, last April, did you get a phone call from him?

A. Yes, sir.

Q. Do you know where he was then?

A. No, I didn't catch where the phone call was from.

Q. Soon after that did you get a letter from him?

A. Yes, sir.

Q. In that letter was there a telegram all printed out ready to be sent?

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A. Yes, sir.

Q. Can you look at this Government Exhibit No. 10 and tell us whether or not that is the telegram that was in that letter? Read it.

A. Do you want me to read it aloud, sir?

Q. No, sir. I just want you to be able to identify it as one you got from Mr. Pereira himself?

A. It looks like the one, sir.

Q. That came right out of the Western Union office from Denver. We just got it. The telegram you received in a letter from Victor Pereira, was there a letter received there with it ?

A. Yes, sir.

Q. What did the letter ask you to do?

[fol. 106] Mr. Fryer: We will object to the letter unless the letter is either produced or accounted for.

Q. Have you got the letter?

A. No, sir.

Q. What became of it?

Mr. Fryer: We would like to test the witness.

Mr. Williams: I am testing it myself.

Mr. Fryer: We are entitled to know if he knows the handwriting or does not.

The Court: The Court will permit him to ask him whether he has the letter.

Q. Did you get a letter signed Victor Pereira or from him?

Mr. Fryer: Well, if it was signed——

The Court: He is not asking you what the contents are. He has asked if he got a letter from the defendant Pereira, and as I understand it he has answered yes.

A. Yes, sir.

[fol. 107] Mr. Fryer: I think we are entitled to test the witness as to whether or not he had ever seen Pereira's handwriting, or whether he knows it was from him. The testimony is it was from Pereira.

Q. What did the letter ask you to do?

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Mr. Fryer: Your Honor, that is the contents of t letter.

The Court: Yes, I think that is the contents.

Q. Have you got the letter?

A. No, sir.

Q. What became of it?

A. I tore it up.

Q. Do you remember the contents of it, general natu of the contents of it?

Mr. Fryer: The same objection.

The Court: Objection overruled as to what particul statement—what it referred to.

Q. As near as you can?

A. I didn't pay a lot of attention. At the time was wor ing on a fishing reel deal. He had a reel and I had a chan to sell it.

Q. And he said something about that?

A. That is right. He said not mention it to the Care in the letter, and at the bottom, just a short note, there w a telegram wrapped up in a piece of paper with $3.00 [fol. 108] $4.00—I don't know—and he asked me to se it to him.

Q. And you did?

A. Well, I had it sent.

Q. And as best you can remember that is it?

A. It looks something like it. It has been a long tim and I didn't pay much attention to it. It was either Cu or Curtis. I didn't pay much attention to it.

Q. In your opinion is that the one you sent to the Weste Union and sent to Pereira?

A. I would say it was, sir.

Q. As best you can remember that is the exact verbia of it?

A. It was already written out.

Q. Just like the one you saw?

A. I can't say it was exactly like it because I can remember.

Q. Was it addressed to Mr. Victor Pereira, 401 We 11th Street, Roswell, New Mexico?

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A. At the time I don't remember where it was addressed to, but I would say it was, yes, sir.

Q. You got this or one like that in a letter from Mr. Victor Pereira himself?

A. Yes, sir.

Q. He asked you to send it back to him?

A. Yes, sir. I stuck it in my pocket. I was going by the Western Union and I reached in my pocket, a man was by the parking meter and I hollered to him and asked him to go in and send it and he could keep the change.

Q. How much did you give him?

A. Whatever was in it, three or four one dollar bills. [fol. 109] Q. I believe before you sent it you did show it to Mr. Carey, did you not?

A. I showed him the letter. I believe he saw the telegram too, yes, sir.

Q. Is Mr. Carey here? Is he still at the hotel?

A. He is at the hotel.

On cross-examination.

Questions by Mr. Fryer:

Q. Do you know the handwriting of Victor Pereira?

A. No, sir.

Q. So that whatever letter you got you don't know whose handwriting it was in, do you?

A. Well, it was signed Vic. I presume it was his.

Q. You are presuming it was his? It was merely signed Vic, is that right?

A. That is right.

Q. And there wasn't any name Pereira on it, isn't that correct?

A. That was quite a while ago, but it had a return address, return to Victor Pereira.

Q. But you don't know the handwriting of the defendant Pereira, do you?

A. No, I can't say I do.

Q. As far as you ever know?

A. I can't say I do.

Q. You can't say what town, whatever telegram that was in it, that call was addressed to you?

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A. Not exactly right at the time I do not, no, sir.

Q. When you were called up you say that there was some phone call from Pereira?

A. Yes, sir.

Q. Do you know where it came from?

[fol. 110] A. I don't know where the phone call came from; but I know that it was Victor that was talking.

Q. Did you know his voice?

A. Yes, sir.

Q. You could tell it was his voice?

A. Yes, sir.

Q. Did you send that telegram yourself or have somebody else to do it?

A. No. I was going down the street, reached in my pocket, there it was rolled up in the paper. I was going by the Western Union, and there was a man standing there, and I gave it to him.

Q. That was the last you ever heard of it?

A. That was the last I ever heard of it.

Mr. Fryer: We now renew our objection, and move to exclude the testimony with reference to some letter, and who wrote it.

The Court: The motion is overruled.

Mr. Fryer. That is all.

On re-direct examination.

Questions by Mr. Williams:

Q. I show you this envelope and letter addressed to Robert Gibson at Denver. Did you get that from Mr. Victor Pereira?

A. Yes, sir. Wait a minute. Yes, sir, I received this letter.

Q. From Victor Pereira?

[fol. 111] A. Yes, sir.

Q. And that is the envelope it came in?

A. Yes, sir.

Mr. Williams: I am just offering this as a handwriting specimen, Your Honor, coming from Victor Pereira. I don't know what is in the letter.

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The Court: Is there any objection?

Mr. Fryer: This is a long letter. I don't know what is in it.

Mr. Williams: I don't know either.

Mr. Fryer: We object to it without the knowledge of more than he has stated.

The Court: The Court repeats, he offers it only for the purpose of showing it is the handwriting of defendant Pereira.

Mr. Fryer: Are you offering this?

The Court: Yes, he said he was offering it for the purpose of showing the handwriting of Pereira, and no other purpose.

[fol. 112] Mr. Williams: I am not going to read it to the jury; I don't think it is material. I don't know what is in it.

Mr. Fryer: We object to some document counsel says he does not know——

The Court: The Court overrules the objection. He assumes he is going to connect it up.

Mr. Fryer: We object to it on the ground it is immaterial and not identified.

The Court: Overrule the objection. It is limited to the purpose stated, to show the handwriting and nothing else, and the Court will give you further instructions about that unless there is further testimony to show the materiality.

(Witness excused).

A recess was taken at 4:40 o'clock P. M., until 9:30 o'clock A. M., January 15, 1952, at which time proceedings were resumed as follows:

[fol. 113] WILLIAM B. MILLER, a witness for the Government, having been duly sworn, in answer to questions propounded testified as follows:

On direct examination.

Questions by Mr. Williams:

Q. What is your name, please?

A. William B. Miller.

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Q. And your business?

A. I am presently Clerk of the County Court of the City and County of Denver.

Q. And does your Court have the records of divorce proceedings in Denver County?

A. Yes, sir.

Q. And the District Court also has, I believe?

A. Yes, sir.

Q. And the District Court also has, I believe?

A. Yes, sir.

Q. And the Clerk of the District Court is Mr. Goodman, who has already been here?

A. So I understand, sir.

Q. Do your two offices contain the records of all divorces granted in proceedings in Denver County?

A. Yes, they do, sir.

Q. Have you searched your record to see if Victor Pereira—you were subpoenaed here?

A. Yes, sir.

Q. Do you have a subpoena with Victor Pereira's name on it?

A. Yes, sir.

Q. Did you search your records to see if that party had a divorce proceedings pending in your Court the last year or two?

A. I did, sir.

[fol. 114] Q. Did he?

A. No, he did not. I found no such name or possible combination of that name.

Q. Nothing similar to it?

A. No, sir.

Q. How far back did you search?

A. I personally went back to January 1st, 1949.

Q. Did your office force look further than that?

A. The office force had been back for another ten years.

Mr. Williams: You can have the witness.

Mr. Fryer: No questions.

(Witness excused).

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W. B. JOHNSON, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

On direct examination.

Questions by Mr. Williams:

Q. What is your name?
A. W. B. Johnson.
Q. And your business?
A. I run the Washington Hotel in Greenville, Texas.
Q. Do you have it under a lease?
A. Yes, sir.
Q. How long have you had the lease?
A. I have had it seven years.
[fol. 115] Q. How much longer does it have to go?
A. Three more years.
Q. In June of this past year, last June, were you trying to sell your lease?
A. No, sir.
Q. Have you ever tried to sell it?
A. No, sir.
Q. Did anybody along through the month of June have an option to buy it, that is exclusive right to buy your lease, and you would extend the time they might buy it?
A. No, sir.
Q. You were not even trying to sell it?
A. That is right.
Q. Do you know the defendant Victor Pereira?
A. No, sir.
Q. Do you recognize that name as anybody who ever tried to buy your lease?
A. No, I do not.
Q. Or lease your hotel, sub-lease it, no dealing with him whatever?
A. No, sir.

Mr. Williams: You may have the witness.

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On cross-examination.

Questions by Mr. Fryer:

Q. Did you have a broker, or any conversation with a broker in Fort Worth about the lease?

A. No, sir, not that I remember.

Q. Well, you would remember it if you had, wouldn't you?

[fol. 116] A. If he made it a point to tell me that is what he was.

Q. Do you remember any occasion when a broker went to you about negotiating a transfer of the lease?

A. Are you talking about the month of June? Previous to that the hotel had been sold.

Q. Yes, I understand.

A. The building, property, had been sold.

Q. I mean with reference to your lease and your possible sale of it. Do you remember of a broker going to see you in Greenville about the possibility of a transfer of the lease?

A. Yes.

Q. You do?

A. Yes, sir.

Q. That is all.

On re-direct examination.

Questions by Mr. Williams:

Q. Do you know anybody by the name of E. J. Wilson, a broker?

A. No, sir, I don't know him.

Q. Just tell the Court and jury what there was about anybody seeing you about your lease now, since they have left the impression?

A. The hotel was listed for sale, the real estate, the building, you see. I leased the operations of the hotel, but the real estate was listed for sale by the lady that owned it, and she listed it for sale with a real estate agency in Dallas, and there was a considerable amount of dealing going on and people coming in and looking at it, and this

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fellow that had the building for sale would bring people in and showed it to them. I was approached about the pos-
[fol. 117] sibility of selling my lease, and my lease is not available for sale except by the consent of the people who own the building. In other words, I can't transfer it without their consent. Therefore I could not list it for sale; if somebody owned the building and owned my lease I could sell it to them of course, and they had asked me if I would consider selling my lease if somebody bought the building and wanted the operation of the hotel. I told them that I would under those circumstances, but I wasn't trying to sell it. I never called anybody, and never tried to sell the lease on the hotel.

Q. You could not sell it without the consent of the owner?

A. That is right.

Q. Or sub-lease it?

A. That is right.

Q. Do you have the records of when the building was sold?

A. The building was sold on May 26th, on a Saturday. To my recollection the property was tied up on that day, and then again on Monday the deal was consummated, and on the 29th it was announced in the papers in Greenville, Texas.

Q. And that was Mr. Tipton Newell's company bought it?

A. J. Tipp Newell bought the hotel.

Q. After that date did anybody approach you about wanting to buy your lease?

A. After Mr. Newell bought the hotel on the 29th of May I have not been approached since that time.

Q. That is all.

[fol. 118] On recross-examination.

Questions by Mr. Fryer:

Q. There was dickering about the occupancy and lease of that hotel, wasn't there? I will ask it this way,—withdraw that question. Your lease had the usual provision in it that you could not transfer it without the consent of the owners of the property?

A. That is right.

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Q. And the hotel was listed for sale, wasn't it?
A. The real estate was, yes, sir.
Q. Yes?
A. Yes.
Q. And you had been approached with reference to the handling of your lease, weren't you?
A. Yes, sir.
Q. Now, who was that that approached you?
A. There was a fellow by the name of Bell, that worked for Mr. McCauley.
Q. Where?
A. Dallas. C. C. McCauley, on Ross Avenue, in Dallas, and this fellow that worked for him was named Bell.
Q. So that there was an approach to you through real estate brokers with reference to the transfer of your lease, if it could be transferred and you could get your price, isn't that correct?
A. That is right.
Q. What was the price?

Mr. Williams: I don't see that is material.
The Court: Objection overruled.

[fol. 119] A. We had not agreed on any price.
Q. I didn't ask you what you had agreed upon. What was your price if you had transferred that lease with the consent of the owner; what was your price?
A. I didn't put a price on it. I did not tell the man I would take any certain amount.
Q. There was a man dealing with you?
A. There was a man asked me if I would make it available if I could get my price.
Q. Will you fix your price?

Mr. Williams: We object to that as wholly speculative and immaterial.
The Court: It is cross examination. The objection is overruled.

Q. All right, what would your price be?
A. You see, I am a partner.
Q. I understand there are two of you?

Mr. Williams: Let the witness answer, please.

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The Court: Yes.

A. In order for me to set a price on something I would have to consult my partner if I wanted to make it for sale, and the two of us together have never set a price on it. If you want me to tell you its approximate value——

Q. That is right, that is what I want you to tell me, the value of your lease, three years unexpired?

[fol. 120] A. We would ask in the neighborhood of $40,000.00.

Q. What is the name of your partner?

A. Jack Spillman.

Q. Where does he live?

A. He lives in Dallas. We operate the Blue Bonnet in Dallas also.

Q. Is he a sort of hotel man that handles hotels?

A. He runs hotels like I do. I run the Greenville property and he runs the Dallas property.

Q. And your price would have been about $40,000.00?

A. Yes, sir.

Q. Weren't the new purchasers endeavoring to dispossess you at the time because the hotel had been run down, wasn't that what was in the air at the time?

A. Will you ask that again, please?

Q. Weren't the owners endeavoring to dispossess you or get rid of you in the hotel because the hotel was run down?

A. The new owners?

Q. Either one?

A. No, sir.

Q. Neither one of them?

A. No, sir.

Q. There is nothing in the air about that?

A. No, sir.

Q. But your price was about $40,000.00 if you sold your lease with the consent of the owners, that is correct, isn't it?

A. Yes, sir.

Q. Did you ever talk to any real estate or hotel broker in either Dallas or Fort Worth about the possible sale?

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[fol. 121] A. I spoke about Mr. McCauley. He is a real estate broker. I talked to him.

Q. That is the man in Dallas?

A. I talked to him.

Q. Do you know if he has a connection in Fort Worth?

A. No, sir, I do not.

Q. That is all.

Mr. Williams: That is all.

(Witness excused).

Walter S. Baker, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

On direct examination.

Questions by Mr. Williams:

Q. What is your name, please?

A. Walter S. Baker.

Q. And your business?

A. Western Union, office manager.

Q. You have with you the records of your Fort Worth office with respect to a telegram that was sent to one Victor Pereira?

A. Yes, sir.

Q. May I have it?

(A Telegram was marked "G-12").

[fol. 122] Mr. Milstead: Defendants object to Exhibit "G-12" for the reason that there is no authentica-ion as to the sender of the telegram.

Mr. Williams: This is a telegram, Your Honor, extending the option.

Mr. Fryer: If Your Honor please, we object to his stating the contents.

The Court: Yes.

(The telegram was handed to the Court).

The Court: The objection is overruled.

Mr. Williams: We offer Government Exhibit G-12 in evidence.

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The Telegram, marked "G-12", is in words and figures as follows:

[fol. 123] EXHIBIT G-12

Western Union

BF Stg Full Rate

No. Wds.—Cl. of svc. 3-11.
Pd. or Coll. Cash No. 1.01.
Charge to the account of 81 20/101.

6-13 1951.

To Victor Pereira Street and No. 401 W. 11th St. Place Roswell New Mexico.

This telegram will authorize 7 day extension of your option. Regards.

E. J. Wilson, 1414 Electric Bldg., Ft. Worth.

Q. The records of your office show that that telegram was sent and delivered as the face of it indicates?
A. Yes, sir.
Q. On the date and place and to the party named?
A. Yes, sir.
Q. Sent and delivered?
A. Well, it was sent. The records indicate it was delivered, yes, sir.

Mr. Williams: You can have the witness.

[fol. 124] On cross-examination.

Questions by Mr. Fryer:

Q. Have you any record that it was delivered?
A. Not with me, no, sir.

Mr. Fryer: Then we move to exclude it on the further ground that the telegram merely comes out of Fort Worth, and there is no record of delivery.

The Court: The objection is overruled.

It was transmitted over your line to the defendant Pereira in Roswell, at that address, was it?

The Witness: Yes, sir.

The Court: The objection is overruled.

Mr. Fryer: No further questions.
Mr. Williams: That is all.

(Witness excused).

[fol. 125] MRS. T. J. SUTHERLAND, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

On direct examination.

Questions by Mr. Williams:

Q. Your name, please?
A. Mrs. T. J. Sutherland.
Q. And where do you live?
A. At Ruidosa, New Mexico.
Q. And how long have you lived there?
A. A little over five years.
Q. Where was your home before that?
A. We lived in Lubbock, Texas, for about twenty years.
Q. Are you related in any way to Gertrude Joyce?
A. No, I am not.
Q. Well, is there some family connection?
A. My husband is Mrs. Joyce's cousin.
Q. Did Mrs. Joyce and Viftor Pereira visit you all in Ruidosa in June of this past year?
A. They were.

Mr. Fryer: We will object to that in behalf of the defendant Brading, on the ground it has no connection with him, he was not present; no act of his can be shown in connection with him, and as to him it is hearsay.

Mr. Williams: That has been overruled fifteen or twenty times.

The Court: Yes. In view of Count 11 of the indictment the objection is overruled.

[fol. 126] Mr. Fryer: We except to the remark of the Court with reference to the 11th count on the ground that it is liable to mislead the jury as to the consideration of the evidence.

The Court: Well, the jury will disregard any remark the

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Court made in that connection. He was just referring to the count of the indictment that he thinks makes it admissible testimony. The jury will disregard that I made the remark. It is an observation of the Court and the reason for admission of the testimony. The objection is overruled.

Q. What did you start to say about their visiting you?
A. Will you ask the question again, please?
Q. Did Gertrude Joyce and Mr. Pereira visit you in Ruidosa, or did you see them in your home, in June, 1951?
A. Not at my home. They were guests at a dinner party that we gave at the Noisy Water Lodge.

Mr. Fryer: Will our objection run without repeating it?
The Court: Yes, continuing objection to all of this testimony.
Mr. Fryer: Continuing objection to all of the testimony in behalf of the defendant Brading?
[fol. 127] The Court: Yes.

Q. All right, they were guests at a dinner party?
A. They were guests at a dinner party.
Q. That you and your husband gave?
A. At the Noisy Water Lodge.
Q. At Ruidosa, New Mexico?
A. On the 15th of June.
Q. 1951?
A. Yes, sir.
Q. Did you have any conversation with Victor Pereira?
A. Yes, I did.
Q. As near as you can relate what he said about Gertrude, and about their marriage, and so forth?
A. He was not talking just to me. We were a group of people sitting talking, and he said to us all sitting at my table, I should think five or six people, he said "I will tell you why I fell in love with Gertrude," he said, "because she is a lady and there are so few ladies left in the world." And shall I continue?
Q. Yes?
A. He said. "When I begged her to marry me I said now be sure that I am the man you want to spend the rest of your life with."

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Q. Did he say anything to you, or in your presence, about the Washington Hotel at Greenville, Texas?

A. Yes, later on, but seated at this same table and with the same people present. I said "Why do you have to go back tomorrow?" This was on the 15th, the night of the 15th, and they had intended leaving the next day, and I said "Why do you have to go back tomorrow? Why can't [fol. 128] you stay over?" And he said, "Oh, we have reservations to fly to Greenville on Tuesday. I have to take up an option on a hotel there."

Q. Do you remember the day of the week this conversation was?

A. This was on Friday night, as I recall it.

Q. And he was going to fly to Greenville?

A. The following Tuesday.

Q. A couple of days later?

A. I don't know? Is it a couple of days later?

Q. Three or four days later. Did he say anything further about the hotel, what he expected out of the hotel, and the financial prospects of it?

A. Not that particular hotel. He had been discussing being in the hotel business. He said that he owned several, what he termed second rate hotels. He said "The overhead is not so great, and I do not have to go near them. I just watch the balance sheets." And he said, "They bring me in about $4,000.00 a month." Those were his words.

Mr. Williams: All right, you can have the witness.

On cross-examination.

Questions by Mr. Fryer:

Q. Now, in this conversation were there some remakrs about Mrs. Joyce being old enough to be his mother?

A. I beg your pardon?

Q. Were there any remarks in that conversation that you had at all with reference to Mrs. Joyce being old enough to be his mother?

[fol. 129] A. Certainly not.

Q. You knew she was old enough to be his mother, didn't you?

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A. No, I did not.

Q. And you say these conversations occurred along in June, 1951, about the middle of June?

A. The 15th of June to be exact, the night of the 15th of June.

Q. You remember that because that was your fiftieth anniversary?

A. No, sir; my fortieth.

Q. I don't want to make it more than it is?

A. That is quite all right. I would be proud of my fiftieth.

Q. It was your wedding anniversary, I take it?

A. Yes, sir.

Q. And Mrs. Joyce had been your lifelong friend since that time?

A. No. I had known Mrs. Joyce about thirty-eight years.

Q. In Roswell?

A. Yes.

Q. And there was a gathering there of your friends?

A. Old friends, yes.

Q. At the Noisy Water Lodge?

A. That is correct.

Q. This other gentleman here, Mr. Brading, was not present at any time during this conversation, was he?

A. No, he was not.

Q. And he was never in Ruidosa to your knowledge?

A. Oh, yes, he was.

Q. He was later?

A. No; before.

[fol. 130] Q. Before?

A. Yes, sir.

Q. But on this occasion he was not present?

A. Not on this occasion.

Q. Who was with him when he was there before?

A. Mrs. Joyce and her sister, Miss Joyner, and Mr. Pereira.

Q. That was just a visit for part of a day, or over night?

A. Oh, no, they just stopped by on their way to Roswell, and were there very briefly. I had an engagement and had to ask them to leave.

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Q. They were in two automobiles?
A. I didn't look out. It was dark. I don't know.

(Witness excused).

ED. CONRAD, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

On direct examination.

Questions by Mr. Williams:

Q. What is your name, please?
A. Ed Conrad.
Q. What is your business, Mr. Conrad?
A. I am Assistant Manager of the Skirvin Hotel, Oklahoma City.
Q. Do you have a registration card there for one Victor Perry, I believe it is?
A. Yes, sir.
Q. Do you see Victor Perry here in the Court room?
[fol. 131] A. I believe—yes, I do, sir.
Q. Where is he?
A. The gentleman right there (indicating defendant Pereira).
Q. The first one in the black suit?
A. Yes, sir.

The Court: You mean the second man at this table here (indicating defendant Pereira)?
The Witness: Yes, sir.
Mr. Williams: The record may show he is pointing to Victor Pereira.

Q. Is this a registration card showing his registration in your hotel?
A. Yes, sir.
Q. And what is the date of it?
A. The date is June 20th, 3:24 P. M.
Q. Did he sign this card "Victor Perry"?
A. Yes, sir.

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Q. In your presence?

A. Yes, sir.

Q. And what is this here (indicating)?

A. That presents a problem, sir. It is either one or two things. There was a lady, and I asked "Is she your wife," or "Is your wife with you?" and I added that on, or it was called to my attention by the bellman; I do not recall which.

Q. That part is yours, "& Wf"?

A. Yes, sir.

[fol. 132] Q. All the rest of it is in his handwriting?

A. Yes, sir.

Q. De Soto, Mississippi, and Victor Perry?

A. Yes, sir.

Q. And that reflects truly the record in your hotel of his registration on the date as indicated on the face, on June 20th?

A. Yes, sir.

Q. 3:00 P. M.?

A. 3:24 P. M., yes, sir.

Q. What does that mean?

A. That is the exact minute that he registered.

Q. The date is June 20, 1951, isn't it?

A. Yes, sir.

(The Registration Card was marked "G-13").

Questions by Mr. Milstead:

Q. Mr. Conrad, do you have rent control in Oklahoma City?

A. Yes, sir.

Q. You are permitted to charge a higher rate for rooms occupied by two people than one?

A. Excuse me, sir. We do not have rent control. I beg to differ. I made a mistake. We do not have rent control in Oklahoma City.

Q. You do have a regulation as to the prices you may charge your guests?

A. I believe there was a Government order at the beginning of the Korean affair, or just after that.

Q. In effect at the time this registration card is dated?

A. Yes, sir.

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Q. Is that correct?

A. Yes.

[fol. 133] Q. And every one who checked into the Skirvin Hotel over there and occupies a room, there were always two of them?

A. No, sir. It is definitely against the policy of the hotel to charge for more than one person. We charge exactly the amount of people who are occupying a room.

Q. Any addition to this signature, registration card, about there being more than one person lodged in this room, that is in your handwriting, isn't that correct?

A. Yes, sir.

The Court: Is this cross examination?

Mr. Williams: I don't know.

The Court: The Court thinks it is not quite in order. Have you offered this in evidence?

Mr. Milstead: I asked him if he passed the witness.

Mr. Williams: Offer this G-13 in evidence.

Mr. Fryer: We will object to it on the ground it is shown not to be in the handwriting of this defendant, but rather a portion of it in his handwriting.

[fol. 134] The Court: The signature part he said was by the defendant Pereira.

Mr. Fryer: If Your Honor please, if you look at the card—the defendants will admit that it is in his handwriting, the signature part.

The Court: Who signed this name Victor Perry.

The Witness: Victor Perry.

Who signed Mrs. —?

The Witness: Me.

Mr. Fryer: I am objecting to the addition for the added charge for the room. Is there any laughing going on?

The Court: Yes. This is no laughing matter, ladies and gentlemen. It is a serious trial, and the Court expects to hold it that way too. The Court will limit this testimony to the statement that this registration card from the Skirvin Hotel in Oklahoma, that the name of Mr. Victor Perry, Route 1, DeSoto, Mississippi, is in the handwriting and was done in your presence by the defendant Pereira in this case.

[fol. 135] Mr. Fryer: On the time as shown on the face of the card?

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The Court: Yes, I understand that too.

Mr. Williams: It is all admissible except the wife. He said he wrote it.

The Court: On the date of June 20, 1951, at 3:24 P. M., registration card No. 213499; and the Court excludes admission of the card itself, but permits that part of it to go to the jury. If so it will have to be qualified. The jury will have to disregard any notation made by this witness.

Mr. Fryer: We object to the card being handed to the jury on the ground——

The Court: The Court will overrule the objection, but will instruct the jury that that part of it which this witness admits he added up there, which I believe is his wife, will be disregarded, as that was made by this witness and not by the defendant.

Mr. Fryer: The further objection on behalf of the defendant Brading there is not any connection between him and this card, therefore hearsay and inadmissible.

[fol. 136] The Court: The objection is overruled. The jury will disregard the writing on this card put on there by this witness.

The Registration Card, marked "G-13", is in words and figures as follows:

EXHIBIT G-13

Room 1138.
Rate 8.
Clerk EC.
Perry Victor (& wf.—not admitted) Skirvin Hotel.
Stamped Skirvin Hotel Arrival Time 1951 Jun 20 PM 3:24 No. 213499 Date .....
Name (Signed) Mr. Victor Perry (& Wf.—not admitted).
Street Rt. 1.
City De Soto, State Mississippi.

Representing: Money, jewels, and other valuable packages must be deposited in our safe, otherwise the management will not be responsible for loss.

Guests without baggage please pay in advance.

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[fol. 137] Redirect examination.

By Mr. Williams:

Q. Was there a woman with Victor Perry the night he registered that caused you to place this and wife on the card.

A. Yes, sir.

Mr. Williams: I offer the card, as the Court has excluded certain parts.

Mr. Fryer: Your Honor please, the same objection on behalf of the defendant Brading.

The Court: Yes, sir. The same ruling.

Mr. Fryer: Continuing objection.

The Court: Yes.

Q. Have you been paid for the stay at this hotel by Mr. Victor Perry or anybody else?

A. No, sir.

Q. Have you taken up the matter with Route 1, De Soto, Mississippi, to see whether you can locate him?

Mr. Fryer: There must be some limitation.

[fol. 138] The Court: He has asked if he made any inquiry at De Soto, Mississippi, to locate Victor Perry?

Mr. Fryer: We will object to that on the ground it would be hearsay as to both defendants.

The Court: The Court is permitting him to ask that question, whether he made inquiry as to Victor Perry.

A. Yes, sir.

Q. Did you find any such party?

A. No, sir.

Mr. Fryer: We object to that on the ground it is hearsay.

The Court: Yes, the Court will sustain the objection to that.

Q. Have you collected for your hotel bill?

Mr. Fryer: Now,——

The Court: He testified he had not.

Mr. Williams: You can have the witness.

BLEED THROUGH– POOR COPY

[fol. 139] Recross examination.

By Mr. Milstead:

Q. I believe you said, Mr. Conrad, you made that notation on that card either because you saw some one with the registrant in the hotel or because some one told you that there was some one with the registrant, or because you suspicioned that some way or other that there were two occupants of the room, is that right?

A. That is correct.

Q. You don't know how you were informed there were two occupants of that room, do you?

A. You want a yes or no?

Q. Yes?

A. Yes, sir.

Q. You do know how you were informed?

A. I say no, I don't know.

Q. Your addition to that was simply a conclusion, is that correct?

A. Yes, sir.

Q. You would not undertake to describe whoever was with the registrant in this room, would you?

A. No, sir.

Q. Do you have a charge ticket for this room?

A. I didn't bring that with me, sir.

Q. You were asked when you were sent for to bring all of the records in regard to it, weren't you?

A. No, sir.

Q. Didn't they ask you to bring the charge ticket?

A. If you are referring to the bill itself, sir, no.

Q. As soon as there is some one checks into the Skirvin Hotel there is a record set up with your charge?

A. Yes, sir.

[fol. 140] Q. But you didn't bring that with you?

A. No, sir.

(Witness excused.)

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A. W. UHLIG, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

Direct examination.

By Mr. Williams:

Q. What is your name, please?
A. A. W. Uhlig.
Q. And your business?
A. I am with the State National Bank.
Q. Your position there?
A. Vice President.
Q. Of El Paso, Texas?
A. That is correct.
Q. Do you have certain official records of the bank with you concerning an account and business dealings of Victor Pereira?
A. Yes, sir.
Q. Do you have a ledger sheet showing the opening of a $1,400.00 account?
A. Yes, sir.

Mr. Fryer: To save time and not to repeat the objection, with the Court's permission will it be noted that an objection is made in behalf of the defendant Brading, for the reason that this is hearsay; it has not been shown he was in El Paso when the account was opened, [fol. 141] or was here when any of the events to which the witness is going to testify occurred.

The Court: Let the record so show, and the objection will be overruled, and it will be a continuing objection to this line of testimony.

Mr. Williams: The record does not reflect he was not here. He said the record showed he was not here at any of these times.

Mr. Fryer: I will amend that. The burden is on the Government to show there was some connection at that time, and the record does not show he was here or participated in any deposit of $1,400.00 or any other transaction; for that reason it is hearsay as to him.

The Court: The objection is overruled.

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A Ledger Sheet was marked "G-14".

Q. This instrument, G-14——

The Court: Pass it to counsel.

Mr. Fryer: He gets the effect of it in any case. It has been held inadmissible.

The Court: Yes, the proper procedure is to have it marked and pass it to opposing counsel.

[fol. 142] Mr. Fryer: We object to Government Exhibit 14 on the ground it has no relevancy in reference to this case as far as the defendant Pereira is concerned; that it is hearsay and could not be binding on the co-defendant Brading.

The Court: The objection is overruled.

Q. This G-14 shows what, Mr. Uhlig?

Mr. Fryer: The document speaks for itself, Your Honor.

The Court: He can explain what it is, what it says. The document is going to be passed to the jury I suppose; it has been marked as an exhibit.

A. It shows on April 30th an account was opened in the amount of $1,400.00.

Q. In the name of whom?

A. Mr. Victor Pereira.

Q. And it correctly reflects deposits and disbursements as to that account thereafter?

A. That is correct.

Mr. Williams: We offer G-14.

Mr. Fryer: We renew the objection.

[fol. 143] The Court: Yes, the objection goes to all of it, and the objection is overruled, and the record will so show.

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The Ledger Sheet, marked "G-14", is in words and figures as follows:

EXHIBIT G-14

The State National Bank of El Paso
El Paso, Texas

Name Mr. Victor Pereira (Hold)
401 11th St.
Address Roswell, N. M.

Checks	Deposits	Date	Balance
Balance brought forward	1,400.00	Apr. 30 '51	1,400.00*
150.00—		May 2 '51	1,250.00*
67.50—51.00—		May 3 '51	1,131.50*
18.00—		May 5 '51	1,113.50*
100.00—		May 10 '51	1,013.50*
21.00—		May 14 '51	992.50*
100.00—		May 29 '51	892.50*
200.00—		June 5 '51	692.50*
203.87—		June 7 '51	488.63*
25.00—		June 11 '51	463.63*
250.00—31.00—		June 16 '51	182.63*
31.00 EC		June 16 '51	213.63*
125.00—		June 19 '51	88.63*
15.00—45.03—		June 20 '51	28.60*
5.50—		July 3 '51	23.10*
5.50 EC 5.52—		July 3 '51	23.08*
.66—		July 21 '51	22.42*
.50 SC		Aug. 27 '51 1	21.92*
[fol. 144] Checks	Deposits	Date	Balance
.50—		Sept. 24 '51 1	21.42*
.50 SC		Oct. 22 '51 1	20.92*
20.92—		Oct. 25 '51 1	20.92*
		20.92	
		Coll	.00*

Q. Mr. Uhlig, do you have there a thirty-five thousand something dollar item?
A. Yes, sir.
Q. Records as to it?
A. That is correct.

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A Check was marked "G-15".

Mr. Fryer: We will object.
The Court: Yes, it runs to all of it.
Mr. Fryer: In behalf of the defendant Brading.
The Court: Let the record so show, and the objection is overruled.

Q. What is this instrument, Mr. Uglig?
A. That is our Cashier's Check payable to Victor Pereira covering the proceeds of the check we collected for him for $35,286.01.
Q. And was that paid to Victor Pereira?
A. That is correct.
Q. In cash?
A. In cash.
[fol. 145] Q. On the date as shown by this, June 18th?
A. No, sir. On that stamp you will see on the face of the check. That is the date the check was issued, June 18th. It shows the paying teller's stamp, dated June 19, 1951.
Q. So that is the date?
A. That is the date the cash was paid to him.
Q. The defendant got that many dollars in cash?
A. That is correct.

Mr. Williams: We offer G-15 in evidence, if I have not already done so.
Mr. Fryer: We repeat the objection at the time of offer.
The Court: The objection is overruled.

The Check, marked "G-15", is in words and figures as follows:

EXHIBIT G-15

The State National Bank of El Paso

88-6 1120

El Paso, Texas, Jun 18 1951 No. 599718

Pay to the order of Victor Pereira $35286.01.

7—50

BLURRED COPY

(Perforated stamp): State Nat'l Bank—El Paso $35286 and 01 Cts.

Cashier's Check

(S.) Katherine Jensen, Authorized Signature.

(Indorsed on back: Victor Pereira.

[fol. 146] Stamped on back: Pay to the order of Any Bank or banker or through Jun 19 '51 2013 El Paso Clearing House The State National Bank of El Paso 88-6 El Paso, Texas 88-6.

(Perforated stamp): Paid 8-19-51 88-6.

(Stamped on face: State National Bank P.T. Jun 10 1951 20 El Paso, Texas.

Q. This instrument marked G-4, is that the original for which this $35,000.00 cashier's check was given to Pereira?

A. Yes, sir.

Mr. Fryer: If Your Honor please, we can't anticipate what the document is before it is shown.

The Court: That was offered yesterday; it is in evidence.

Mr. Fryer: We want to renew our objection, particularly in behalf of defendant Brading.

The Court: The objection is overruled.

Q. Does your record show what your bank did with this instrument when it was deposited there for collection?

A. Yes. The item was presented to us on June 15th for collection, entered for collection on that date. We sent direct to the head office of the Citizens National Bank, where the check was drawn on, by mail.

[fol. 147] The Court: Citizens National Bank where?

The Witness: Los Angeles.

The Court: California?

The Witness: California.

A. With instructions to wire fate.

The Court: Wire what?

The Witness: Wire fate.

The Court: What does that mean?

The Witness: That means, Judge, to wire us if the item is paid or if it is not, to wire us in either event.

BLEED THROUGH– POOR COPY

The Court: But you sent the check through the United States mail?

The Witness: Yes, sir.

[fol. 148] The Court: To this bank in Los Angeles, California?

The Witness: That is correct.

A. Wire advice of payment was received June 16th, stating that this check had been paid and they were crediting our account with the proceeds.

Q. Then on June 19th you gave Victor Pereira that amount of money?

A. That is correct, yes, sir.

Mr. Williams: You may have the witness.

Cross examination.

By Mr. Milstead:

Q. Did you ever see either one of the defendants?

A. No, sir.

Q. You had no personal transaction with them whatever?

A. No, sir.

Q. You say you have your records there. Do you have a copy of the letter of transmittal?

A. Yes. This is our copy of the letter of transmittal; the original goes out with the check.

Q. You do not know who presented the check for payment?

A. No, sir.

Q. You have no actual knowledge of it at all; you are testifying strictly from the records that you brought with you?

A. That is correct.

[fol. 149] Q. You yourself did not make payment on the check?

A. No, sir.

Q. The basis of your testimony in that regard is the pencil memorandum on your copy of some of the record?

A. That is our record of how the item was handled.

Q. As far as the bank was concerned you wired inquiring about payment, and received your replies by wire?

A. No, sir. We did not wire them. Our instructions,

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when we send the item out, on the letter, as I stated before, and was to wire us fate of the item.

Q. And you got a telegram?

A. We received a wire from the bank stating that the item had been paid.

Q. That is all.

(Witness excused.)

MRS. GERTRUDE JOYCE, was recalled as a witness by the Government, and further testified as follows:

Redirect examination.

By Mr. Williams:

Q. You are Mrs. Gertrude Joyce?

A. Yes.

Q. You testified here yesterday?

A. Yes.

Q. On this G-5 I believe you identified it as the handwriting of Victor Pereira, the letter to you?

A. Yes.

[fol. 150] Q. And the envelope?

A. Yes.

Q. Now, I will show you G-11, which is another letter in evidence for the purpose of identification of handwriting only, and will you say whether that is Victor Pereira's signature and writing?

A. I would say that was Victor's signature and writing.

Q. What about the printing on the envelope?

A. That is his printing, because I have seen that before.

Q. That is all.

Mr. Fryer: That is all.

(Witness excused.)

The Court: Those were offered yesterday?

Mr. Williams: G-11 is already in evidence. No I offer G-5, which was ruled out yesterday, the contents of it, the signature.

The Court: The Court admits it for the purpose of hand-

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writing, not as to the contents, the writing on the letter and on the envelope.

Mr. Fryer: We renew our objection on the same grounds.

[fol. 151] The Court: Let it be understood and let the record so show——

Mr. Fryer: Particularly as to the defendant Brading.

The Court: It is being admitted by the Court for the purpose of identification, handwriting only.

GEORGE F. MESNIG, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

Direct examination.

By Mr. Williams:

Q. What is your name, please?

A. George F. Mesnig—M-e-s-n-i-g.

Q. And your business?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. And your particular line of work?

A. I work as a document examiner in the F. B. I. laboratory at Washington, D. C., where I perform examinations in all phases of that work, handwriting, hand printing, and typewriting, and so forth.

Q. You are what would generally be called a handwriting expert?

A. Yes, that is right.

Q. Identify one with the other, as to who wrote it?

A. That is right.

Q. And how long have you studied that work?

[fol. 152] A. I have been employed by the F. B. I. over fifteen years, and over thirteen years of that time has been devoted to the study of questioned documents.

Q. I believe you have examined certain instruments that are in this Court now. Have you seen this instrument G-5, which is a letter to Gertrude Joyce Pereira, Roswell?

A. Yes, I have.

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Q. Have you seen this instrument marked G-11, and especially the printing on the envelope?

A. Yes, I have seen both the envelope and the enclosed letter.

Q. Have you examined this telegram marked G-10, or a photostatic copy of it?

A. Yes, I have.

Q. If you assume that Victor Pereira, the defendant in this case, wrote these instruments G-5 and G-11, then in your professional opinion who printed that telegram you hold in your hand?

A. The same individual who prepared Government Exhibits 5 and 11.

Q. Have you examined a photostatic copy of this registration card from the Skirvin Hotel, G-13, in the name of Victor Perry?

A. Yes, I have.

Q. In your opinion who wrote that word "Victor Perry"?

A. The name Victor Perry and the address appearing on this hotel registration card for the Skirvin Hotel, Government Exhibit 13, that was written by the writer of Government Exhibits 5 and 11, which was given to me as the purported known handwriting of Victor Pereira.

[fol. 153] Q. I do not believe you have examined this signature, and I don't know whether you are willing to testify without an examination (indicating).

A. No, I have not seen that document.

Q. Well, I show you G-15, and ask you if in your opinion, if you can answer with a casual examination, can you say whether or not that is Victor Pereira's signature the same as on the other documents?

A. I would prefer to take time, rather than on the witness stand; I don't believe it is fair to——

Q. Would you say in your best opinion?

A. It has a number of the characteristics of Victor Pereira's handwriting. Yes, it does look like his handwriting.

Q. Does it look the same as these signatures on G-3 and G-4?

A. Yes, that signature is similar to the two Victor Pereira signatures on G-3 and G-4 also.

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Q. Well, in your best opinion, without committing yourself definitely, are these identical with the other signatures you have before you?

A. Yes, they appear to be.

Q. Have you any enlargements of the signatures of Victor Pereira that would be of benefit of laymen to see them?

A. I have prepared photograph enlargements of Government Exhibit G-11 and of Government Exhibit 13 which is the hotel registration card. Those are the only documents which we have enlarged.

Q. The hotel registration card?

A. That is right.

Q. Let's see that enlargement, please?

A. This is a photograph enlargement of the hotel registration card (indicating).

[fol. 154] Mr. Milstead: If the Court please.

The Court: Yes. The others about the letter will not be offered, I mean read or exhibited to the jury, except for identification of handwriting. It has been admitted that letter is a confidential communication.

Mr. Milstead: No, this was written in October.

Mr. Williams: It is immaterial as to the case. Might show this just for the purpose of identification.

Mr. Fryer: I can read it from here.

Mr. Williams: Tell me a word on it.

Mr. Fryer: Dear Bob.

The Court: If it is a letter offered in evidence he can testify about it; if not he cannot.

Mr. Fryer: It was not offered.

The Court: It is admitted for identification only, and will not be exhibited or read to the jury. It is a confidential letter.

[fol. 155] (Mr. Williams approached the witness and whispered to him.)

The Fryer: We object.

The Court: Yes. The attorney ought to examine the witness before you put him on the stand.

Mr. Williams: That is all.

Mr. Fryer: No questions.

The Court: He is objecting to your whispering.

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Mr. Williams: He is objecting to everything.

Mr. Fryer: Now, if Your Honor please.

The Court: That is improper too, and we will conduct this case in an orderly way.

Mr. Fryer: Certainly the remarks should not be made in front of the jury, and we except to them.

(Witness excused.)

[fol. 156] THOMAS R. FOSTER, a witness for the Government, having been duly sworn, in answer to questions propounded, testified as follows:

Direct examination.

By Mr. Williams:

Q. What is your name?

A. Thomas R. Foster.

Q. What business are you in?

A. Bank clerk.

Q. At the State National?

A. At the State National Bank of El Paso.

Q. Here in El Paso?

A. Yes, sir.

Q. Did you deal some with Mr. Victor Pereira here with any of his accounts in that bank?

A. I did.

Q. Do you know him when you see him?

A. No, sir.

Q. Can you look at this gentleman and say whether or not he is the man who opened the account with you or dealt with you?

A. I believe with certainty I can.

Q. In your best opinion is it the man?

A. That is the man that came to my window.

Q. Did you have any connection with this $35,000.00 something item?

A. I am the man that sent it in to Los Angeles for collection.

Mr. Milstead: May we have a continuing objection as far as defendant Brading is concerned, this is hearsay?

BLEED THROUGH– POOR COPY

[fol. 157] The Court: Yes. Objection is overruled.

Q. What, if anything, did he say to you and did you say to him; what was the conversation?

A. It was about getting the money for the check involved.

Q. As near as you can, what did he say and what did you say?

A. That has been some months ago, and I can't quote it.

Q. What did he want?

A. He wanted to enter this check for collection and receive the funds as soon as possible.

Q. Did you have anything to do with the cashing of the check?

A. The actual cashing of the check is done in Los Angeles and paid to us. He received a cashier's check from our department, which was cashed in our pay cage.

Q. Did you handle the item?

A. I handled the item when it came back from Los Angeles.

Q. I mean paying the money?

A. No, sir.

Q. Did you issue a cashier's check to him?

A. Yes, sir.

Q. Then the records of the bank shows it was cashed that day?

A. It was cashed in our pay cage, and our paying teller at that time called me and asked me to identify—asked me if that was the man who was supposed to have the check, which I had checked his signature against the signature on our bank files, and I told him it was his check and he could have the money.

[fol. 158] Q. So the records show he got the money at that time?

A. That is right, sir.

Q. Do you know what denomination bills he was paid with?

A. Not exactly, sir. There were some thousand dollar bills, some five hundred dollar bills, and the balance was paid out in hundreds and maybe some fifties; that I do not know.

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Q. But you feel almost certain this is the man you dealt with and identified?

A. Yes, sir.

Mr. Williams: You can have the witness.

Mr. Milstead: No questions.

(Witness excused.)

A recess was taken at 11:25 o'clock A. M., until 1:00 o'clock P. M., at which time proceedings were resumed:

CEDRIC C. CHRISTIAN, a witness for the Government, being duly sworn, in answer to questions propounded, testified as follows:

An instrument was marked "G-16".

Mr. Milstead: (At the bench, out of hearing of the jury): 1944 divorce decree. We will object to it on the ground [fol. 159] that it is not properly authenticated to be admissible in this Court, and further on the grounds that it is remote and immaterial to any issue in this case.

Mr. Williams: It is a divorce between Ada and this Pereira in 1944, when all of the evidence shows he was representing he was getting a divorce in 1950 from Ada.

Mr. Milstead: Not from Ada.

Mr. Williams: Yes, Mrs. Joyce said he was getting a divorce from a wife named Ada.

The Court: It is a certified copy of it?

Mr. Williams: It is a certified copy of a divorce decree.

Mr. Milstead: It is not authenticated under the Federal Statute.

The Court: What do you say about that?

Mr. Williams: I think the statute requires certified copies.

Mr. Milstead: I think you will find that the statute requires that it be certified by the presiding magistrate that he is the Clerk, and that it be certified by the Clerk that he is the presiding Judge.

[fol. 160] The Court: That is the impression the Court has.

Mr. Williams: Well, it could be. I don't care.

The Court: Objection sustained.

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Direct examination.

By Mr. Williams:

Q. What is your name?
A. Cedric C. Christian.
Q. What is your business?
A. In the telephone answering service in Fort Worth.
Q. Telephone answering service?
A. That is right, service.
Q. Well, tell us please what is that service?
A. It is a service whereby we answer the phone for other people, either a direct extension off of their phone or by using one of our phones.
Q. Do you have customers?
A. That is right.
Q. And they pay you a certain rate per month?
A. That is right, on a monthly basis.
Q. You accept their phone calls just like an office service?
A. That is right, the same thing.
Q. Then you give it to your customer? How do you get the message to him?
A. He usually calls in on the phone, and it is relayed over the phone to him.
Q. The message itself?
[fol. 161] A. That is right. The person calling, or anything——
Q. Anything they want you to say?
A. That is right.
Q. Do you have your records with you for a service like that taken out by E. J. Wilson?
A. That is right; I do.
Q. When did E. J. Wilson register or become a customer?
A. May 22nd. Actually it was set up on May 21st by a phone call from Dallas.
Q. On May 21st, last, 1951?
A. 1951, that is right.
Q. Did some one come to your office, E. J. Wilson for instance, come to your office and become a customer with you?
A. That is right. He paid for one month in cash.
Q. From May 21st to June 21st?

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A. That is right.
Q. In cash?
A. That is right.
Q. Do you see that E. J. Wilson in the Court room?
A. I do, yes, sir.
Q. Where is he?
A. The last man on the end of this table (indicating).
Q. The one with the glasses on?
A. That is right.

Mr. Williams: Your Honor, may the record show he has identified the defendant James Brading?
The Court: Yes.

[fol. 162] Q. Did you personally have some conversation with him when he became your customer?
A. Naturally he introduced himself and said he wanted to pay his account, and I gave him a receipt.
Q. What name did he introduce himself?
A. E. J. Wilson.
Q. Then do your records show any service you extended to E. J. Wilson?
A. I only have the work sheet for May and June. That shows there was, I believe, three messages in May and one in June. The actual message itself has been destroyed because we only save those for ninety days. We take about 10,000 messages a month and ninety days is all we hold the actual messages we receive for a customer.
Q. Your record does not show the date you rendered service?
A. No, just the total for the month.
Q. How many in May?
A. I believe three in May and one in June. In other words, we have a minimum number of messages on the account. A person using our phone has twenty messages, and the charge is for a minimum, plus an excess for any messages over twenty, and this total is just for that purpose; no other purpose at all.
Q. And the messages then were kept——
A. For ninety days.
Q. ——for ninety days, and then destroyed?
A. And then destroyed.

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Q. Are you certain this is the man that obtained that service under the name of E. J. Wilson?

A. I am.

Q. What is the address of your service?

[fol. 163] A. 1414 Electric Building, and I have been there since April 1st, 1947.

Q. Fort Worth?

A. That is right.

Q. 1414 Electric Building, Fort Worth, Texas?

A. Yes, sir.

Mr. Williams: You may have the witness.

Mr. Milstead: No cross.

(Witness excused.)

Mr. Williams: The Government rests, Your Honor.

Mr. Milstead: We have some motions to make, if the Court please,—probably should be made in the absence of the jury.

MOTION TO DISMISS COUNTS 2 TO 9 INCLUSIVE AND ORDER GRANTING SAME

Mr. Williams: Your Honor, just one thing I did overlook which might save some of their motions. You have that indictment I gave you. Your Honor, the Government has made no effort to prove up the mailing counts in the second, third, fourth, fifth, sixth, seventh, eighth and ninth counts of the indictment, and therefore moves to dismiss those. That leaves remaining the first, tenth and eleventh counts.

[fol. 164] The Court: The Government moves to dismiss the second, third, fourth, fifth, sixth, seventh, eighth and ninth counts?

Mr. Williams: Yes, sir.

The Court: And you say that leaves remaining counts one, ten and eleven?

Mr. Williams: Yes, sir.

The Court: All right, motion to dismiss as to those counts is granted.

Mr. Fryer: We still have a motion.

The jury retired from the Court room at 1:15 P. M.

The Court: All right, gentlemen, the Court will hear you now.

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MOTION TO COMPEL ELECTION AND DENIAL THEREOF

Mr. Milstead: The first motion in behalf of both defendants is that the Government be required to elect between count 1 and count ten. It is submitted that those two counts charge but a single offense. In that first count it is charged that by the mailing or causing to be mailed of this $35,000.00 check on June 15, 1951, is in furtherance of a scheme to defraud, that the defendants have committed [fol. 165] the offense of mail fraud, whereas in count ten it is charged that on the same date by the mailing of the same document addressed to the same parties at the same places the offense of transportation of stolen property in Interstate Commerce was committed. It is submitted that the Government has undertaken to prosecute twice for one alleged wrongful act, and that insofar as the evidence adduced here is concerned it relies on the same identical proof for a conviction under either count. We believe that the Government should be required to elect on which theory of the case it desires to proceed.

The Court: Would the District Attorney like to be heard on that motion?

Mr. Williams: The evidence is entirely different. The first count is using the mails to defraud, and it is not simply the check involved and does not mention the $35,000.00. The Government has seen fit to carve two separate offenses out of these facts, and it is always the rule that the prosecuting attorney does not have to elect when the facts or both offenses are based on the same transaction. Here the evidence is different, and it is different transactions entirely. I do not feel there is any trouble about it at all, and if anybody had to elect the jury could.

The Court: The motion is overruled.

[fol. 166] MOTIONS TO STRIKE PARTS OF TESTIMONY AND CERTAIN GOVERNMENT EXHIBITS AND RULINGS THEREON

Mr. Milstead: Exception. Now, if the Court please, I would like to present severally on behalf of each defendant a motion to strike. In order to consolidate somewhat the objections that we made as we went along, in behalf of the

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defendant Pereira objection is made and the motion is directed to all of the testimony of the witness Gertrude Joyce for the reasons previously stated, that she was not a competent witness against her husband. The defendant Brading moves to strike the testimony of the witness Joyce with regard to a check for $1,000.00, which is Government Exhibit No. 1, and her testimony in regard to the check, for the reason it was hearsay as to the defendant Brading. The defendant Brading moves to strike the testimony of the witness Joyce as to a conversation with the defendant Pereira with regard to the Cadillac automobile, for the reason that was hearsay as to Brading, and also the testimony of the witness Joyce as to the source of the money for the purchase of that automobile; for the same reason the defendant Brading moves to strike Government Exhibit 3, and the testimony in regard to it, for the reason that it was hearsay as to him.

The defendant Pereira moves to strike the testimony of the witness Joyce of the conversation subsequent to May 25th en route from Kansas City to Dallas regarding the purchase of a hotel in Greenville, for the reason that it was a confidential communication between husband and wife. And the same defendant further objects to the testimony of the witness Joyce with regard to their conversations in Dallas as to the details of the transaction on the purchase of the Greenville hotel because confidential communications [fol. 167] between husband and wife. Defendant Brading moves to strike the same testimony for the reason it was hearsay as to him. Directing each objection on behalf of each defendant as previously stated, the defendants move to strike the testimony of the witness Joyce with regard to her sale of securities for the acquisition of the money to buy the Greenville hotel, and the details of the conversation between Mrs. Joyce and the defendant Pereira with regard to his transaction with E. J. Wilson in Fort Worth; object to the testimony of the witness Joyce, and move to strike it in so far as the defendant Pereira is concerned, on the ground that it was a wife, and it was hearsay as to the defendant Brading, concerning the conversation between them as to why she told him he should bank in El Paso rather than in Roswell.

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Move to strike Exhibit G-4 for the reason that it and the testimony adduced from the witness Joyce in regard to that check was a confidential communication between Pereira and wife and was hearsay as to Brading.

We move to strike Government Exhibits G-6, G-7 and G-8 for the reason that at the present time those checks are utterly immaterial here and are involved in the mail counts that will not go to the jury.

Defendant Brading moves to strike Exhibit G-10 through whom that exhibit was offered, for the reason that no connection is shown and it is hearsay as to the defendant Brading.

[fol. 168] Make the same objection in behalf of the defendant Brading with regard to that exhibit and the testimony of the witness Robert Gibson.

Make the objection and motion to strike in so far as defendant Brading is concerned relative to Government Exhibit No. 11 for the reason it is hearsay and not binding on that defendant.

Defendant Brading renews his objection and moves to strike all of the testimony of the witness Mrs. T. J. Sutherland relative to a conversation between her and the defendant Pereira occurring on or about June 15, 1951, as related by her.

Defendant Brading moves to strike Exhibit G-13 and the testimony of the witness Ed Conrad, through whom that exhibit was offered, for the reason it was hearsay as to the defendant Brading and not binding on him.

Move to strike Exhibit G-14 and the testimony of the witness Uhlig, through whom it was offered, on behalf of the defendant Pereira for the reason it was not relevant, and for the defendant Brading because it was hearsay as to him.

Make the objection on behalf of the defendant Brading and move to strike Exhibit G-15 for the reason that there is no connection shown between that exhibit and the defendant Brading, it was hearsay as to Brading, and the testimony of the witness Uhlig in regard to the check would be hearsay as to and exhibits would be hearsay as to the deef-ndant Brading. *Brading.*

[fol. 169] Defendant Brading moves to strike Exhibit No. 4 and the testimony of the witness Uhlig, through whom

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that exhibit was offered, and his testimony in regard to the same, for the reason that both the testimony and exhibits would be hearsay as to the defendant Brading.

Defendant Brading moves to strike the testimony of the witness Mesnig in its entirety for the reason that it was all hearsay as to the defendant Brading.

Defendant Brading moves to strike the testimony of the witness Thomas R. Foster in so far as he is concerned, for the reason it related only to a conversation with defendant Pereira at a time when defendant Brading was absent, and would be hearsay and not binding as to him.

Defendant Pereira moves to strike the testimony of the witness Christian for the reason that his testimony would be hearsay as to the defendant Pereira, not showing defendant Pereira was present at any time he had a transaction with defendant Brading.

Mr. Williams: The Government joins in their motion to withdraw Exhibits 6, 7, and 8, and asks the Court to overrule the rest of them.

The Court: All right, the Court grants the motion as it is just mentioned by the District Attorney, and they are accordingly withdrawn. All other motions and objections made by counsel for the defendants are denied and overruled.

[fol. 170] MOTION OF DEFENDANTS FOR A VERDICT OF ACQUITTAL AND ORDER OVERRULING SAME

Mr. Milstead: At the close of the Government's case the defendants, and each of them, move for a verdict of acquittal.

The Court: That motion will be overruled, is overruled.

Mr. Milstead: If the Court please, since the jury is out now we might advise that the defendants now rest, and will advise the jury as soon as the jury returns to the box; and in connection with the Court's charge the defendants have a number of instructions, and we thought we might have a short conference about the charge.

The Court: The Court will be glad to consider your special requests, but the charge will be along the usual lines,

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that able counsel is quite familiar with, covering the allegations in counts 1, 10 and 11, and the reading of the statutes covering those offenses, the articles which are mentioned in the indictment, usual application, together with the usual definitions.

Mr. Milstead: If the Court please, I will hand to the Clerk in written form a motion for acquittal, which the Court has already acted upon, and a motion for election in written form, which the Court has already acted upon, and our requested instructions.

[fol. 171] Motion to Elect—Filed January 15th, 1952

To said Honorable Court:

Come now the defendants, and each of them, and move the Court to require the plaintiff to effect an election between the several counts charging a plurality of offenses for a single offense, and to state for which offense alleged, the defendants and each of them must answer.

Respectfully submitted, Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Motion for Acquittal—Filed January 15th, 1952

To said Honorable Court:

Come now the defendants, Victor Emanual Pereira, and Eugene H. Brading, and move the Court to instruct a verdict of acquittal on each and every count in the indictment. This Motion is made on the following grounds:

I. There is no substantial or competent evidence now in the record to justify the Court in holding either defendant to answer to any or all of the counts in said indictment.

II. The prosecution has failed to establish any scheme or artifice to defraud as alleged in the indictment.

[fol. 172] III. The prosecution has failed to establish by substantial or competent evidence that the defendants, or

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either of them, caused to be mailed any of the mail items specifically described in the indictment, either in furtherance of said scheme, or otherwise.

IV. The indictment charges, and the Government undertakes to establish more than one offense for one alleged criminal act.

V. The indictment charges, and by the evidence adduced the Government has undertaken to show two separate schemes to defraud, and hence a verdict cannot stand on any count.

VI. There is no substantial or competent evidence that the mail items described in each count of the indictment were mailed in furtherance of or to execute the alleged scheme to defraud, or that same did in fact execute the scheme, or that such items were in fact mailed.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

A true copy of the original, I certify.
Maxey Hart, Clerk, By Pauline G. Silvers, Deputy.
(Seal.)

The Court: Mr. Marshal, will you bring back the jury, please?

The jury returned to the Court room at 1:55 P. M.

[fol. 173] Colloquy Between Court and Counsel

The Court: The Government has rested its case. What do the defendants say?

Mr. Milstead: The defendants rest.

The Court: All right, gentlemen, you will proceed to the arguments, which will be limited to an hour and a half to the side.

Mr. Milstead: I believe the rules require we re-present our motions.

Reoffered Motions of Defendants and Ruling Thereon

The Court: Yes. Let the record show all motions and objections made by the defendants are now re-offered, since the jury has been returned to the Court room, and are ac-

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cordingly overruled, except for the items mentioned in the Court's ruling while the jury was out.

Prior to the beginning of arguments the defendants submitted to the Court the following requested instructions:

DEFENDANTS' REQUESTED INSTRUCTION NO. 1

Gentlemen of the Jury:

The defendant in a criminal prosecution is not called upon to prove his innocence, nor need he do so in order [fol. 174] to secure an acquittal, but such acquittal must necessarily occur unless the prosecution has proven the defendant's guilt beyond a reasonable doubt. A mere suspicion, or even a strong suspicion of the defendant's guilt would not justify conviction, and, even should the evidence, in your opinion, preponderate in favor of the guilt of the defendant, this alone would not justify a verdict against the defendant. A mere preponderance of the evidence is not sufficient to warrant a conviction in a criminal case. Before you can convict you must be satisfied beyond a reasonable doubt that the facts presented in the evidence are incompatible with any reasonable theory of the innocence of the accused and incapable of any reasonable hypothesis than that of his guilt. Otherwise, such defendant must be acquitted.

Fryer & Milstead, By (S.) Coyne Milstead, Attorneys for Defendants.

Refused: (S.) R. E. Thomason, Judge.

DEFENDANTS' REQUESTED INSTRUCTION NO. 2

Gentlemen of the jury:

You are instructed by the Court as a matter of law that two elements are essential and necessary to constitute an offense under Section 1341, United States Code as to the defendants here on trial, and as to each of said defendants: [fol. 175] first, that said defendants acting severally, or said defendants acting together jointly, did devise a scheme and artifice to defraud, such as charged in the respective

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counts of the indictment herein, and, secondly, that to execute the purpose of such scheme and artifice to defraud, that such defendants did deposit, or did knowingly cause to be placed in an authorized depository for mail matter, or did knowingly cause to be delivered by mail by the Post Office Establishment of the United States, on the dates and at the places charged in the respective counts so charged. The gravamen of the offense preferred in the first nine counts of the indictment is the use of the mails of the United States of America in the execution of a devise and scheme to defraud. It is not sufficient that you find from the evidence beyond a reasonable doubt that the scheme was devised and a fraud perpetrated. Under the law you must further find from the evidence beyond a reasonable doubt that there was an unlawful use of the mails as hereinbefore charged you.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Refused: R. E. Thomason, Judge.

[fol. 176] DEFENDANTS' REQUESTED INSTRUCTION No. 3

Gentlemen of the jury:

You are instructed that each defendant is entitled to have you consider, and under these circumstances you will consider, each defendant's case separately from that of the other defendant. In other words, each defendant is entitled to the same consideration by you of his case as if he alone were on trial before you.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Given: R. E. Thomason, Judge.

DEFENDANTS' REQUESTED INSTRUCTION No. 4

Gentlemen of the jury:

In passing on the guilt or innocence of a defendant in this case you are instructed that dishonorable conduct, or practice of deceit, fraud or misrepresentation, or unlawful

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acquisition of money by one or more of the defendants, is not sufficient to authorize a conviction on any count in the indictment. Before you would be authorized to convict a defendant using such practices, you must find and believe [fol. 177] beyond a reasonable doubt, that one defendant had associated himself with the other defendant charged in the indictment in devising or intending to devise a scheme or artifice to defraud; and that before such a defendant can be convicted, you must further find from the evidence beyond a reasonable doubt, that such defendant, for the purpose of executing said scheme or artifice, mailed or caused to be mailed, as to each count in the indictment that is submitted to you for determination, the mail items set out in each such count.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Given: R. E. Thomason, Judge.

DEFENDANTS' REQUESTED INSTRUCTION NO. 5

Gentlemen of the Jury:

There is no presumption that a scheme or artifice to defraud, even if shown to have existed at one time, continued to exist at any later or subsequent time. Therefore, the Government's burden of proving that the scheme or artifice alleged in the indictment was in existence at the time of the alleged use of the mails in the specific instance named in the indictment, is not sustained by evidence that such alleged scheme or artifice existed or might have [fol. 178] existed at some time prior to such alleged use of the mails.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Given: R. E. Thomason, Judge.

DEFENDANTS' REQUESTED INSTRUCTION NO. 6

Gentlemen of the Jury:

You are instructed that matters of fact, if any, which are left uncertain by the evidence, cannot be made certain

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to the prejudice of the defendant by inference. In the sense of evidence, no inference can be found by the jury against the defendant; but on the contrary all the inference and presumptions consistent with the facts proved, are to be found and indulged in favor of the innocence of the defendant. No fact or circumstance upon which you may base a conclusion of guilt is sufficient, unless such fact or circumstance has been proved beyond a reasonable doubt, and to the same extent as if the whole conclusion depended on that one fact or circumstance.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Refused: R. E. Thomason, Judge.

[fol. 179] DEFENDANTS' REQUESTED INSTRUCTION NO. 7

Gentlemen of the Jury:

By the finding of an indictment, no presumption whatsoever arises to indicate that a defendant is guilty, or that he has any connection with or responsibility for the act charged against him. A defendant is presumed to be innocent at all stages of the proceeding until all of the evidence shows him to be guilty. And this rule applies to every material element of the offense charged.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Refused: R. E. Thomason, Judge.

DEFENDANTS' REQUESTED CHARGE NO. 8

Gentlemen of the Jury:

In case you should have a doubt as to the existence or non-existence of any fact before you in this case, you will put that interpretation on the evidence most favorable to the defendants.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Refused: R. E. Thomason, Judge.

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[fol. 180] DEFENDANTS' REQUESTED INSTRUCTION No. 9

Gentlemen of the Jury:

You will not consider or be influenced by any rulings the Court may have made on any motions that may have been presented on the trial of this case, or to the introduction of any testimony in the case the rulings on same being on questions of law and not questions of fact, and it is the province of the jury to pass on questions of fact, and in your passing upon the same you are limited by the testimony as given from the witness stand on trial of the case and the law as given you in charge by the Court as applicable to the issues of fact submitted you for consideration in the case.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Given: R. E. Thomason, Judge.

DEFENDANTS' REQUESTED INSTRUCTION No. 10

Gentlemen of the Jury:

The Government in this case depends in part for a conviction as to each defendant on what is termed in law circumstantial evidence. You are instructed by the Court [fol. 181] that in order to justify a jury in finding a verdict of guilty based in part on circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence; or, stated in another form, it is sufficient that the circumstances proved coincide with, account for, and therefore render probable, the hypothesis of guilt, asserted by the prosecution, but they must exclude to a moral certainty, and beyond a reasonable doubt every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Refused: R. E. Thomason, Judge.

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DEFENDANTS' REQUESTSD INSTRUCTION No. 11

Gentlemen of the Jury:

If any of the witnesses have exhibited prejudice or bias against defendants, and satisfied you that they have not testified truly and are not worthy of belief, and you think their testimony should be disregarded, you may disregard it altogether.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Refused: R. E. Thomason, Judge.

[fol. 182] DEFENDANTS' REQUESTED INSTRUCTION No. 12

Gentlemen of the Jury:

The burden on the Government to prove a fraudulent intent on the part of the accused. Such intent must be proved specifically and it cannot be implied alone from the fact that the promises, representations alleged were made and that they were false. Such intent is to be determined by the jury from all of the facts and circumstances disclosed by the evidence; it is not an inference of law arising from the proof of the making of false statements.

Fryer & Milstead, By Coyne Milstead, Attorneys for Defendants.

Refused: R. E. Thomason, Judge.

DEFENDANTS' REQUESTED INSTRUCTION No. 13

Gentlemen of the Jury:

The fact that letters or items other than those specifically alleged in the indictment may have been mailed, or caused to be mailed by the defendants, or one of them, is entirely immaterial in determining whether there has been a criminal use of the mails by the defendants. On that question, you can consider only whether there is proof beyond a reasonable doubt and to a moral certainty, of the mailing

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[fol. 183] of the specific letters and items expressly set forth and described in the indictment.

Fryer & Milstead, By —— Attorneys for Defendants.

Given: R. E. Thomason, Judge.

Which special requested instructions were by the Court overruled, except as otherwise noted, to which action of the Court defendants excepted.

Thereupon counsel for the Government and for the defendants argued the case to the jury, following which the Court charged the jury, orally, as follows:

CHARGE OF THE COURT

Gentlemen of the Jury:

Following the custom and procedure in Courts of the United States, the Court will give you an oral charge, covering the law in this case, and inasmuch as you will have no written charge with you, only the indictment and the form of your verdict, he invites your careful attention [fol. 184] and consideration of what he is about to say. If, however, you wish the exhibits in the jury room with you, for your study and inspection, you will advise your bailiff and the Court will send them to you.

You heard the indictment read when the defendants, Victor Emanuel Pereira and Eugene H. Brading, were arraigned and to which each entered a plea of not guilty. The defendants, Pereira and Brading, are charged in eleven counts in the indictment, but at the close of the evidence the Government moved to dismiss counts 2 to 9, inclusive, which the Court granted. Therefore the case will be submitted to you for your determination only as to the first, tenth and eleventh counts, which the Court will later identify and explain to you and instruct you the law applicable thereto.

In the first count of the indictment returned by the grand jury the grand jury charges that commencing on or about April 19, 1951, and continuing thereafter until on or about *April 19, 1951, and continuing thereafter until on or about* August 11, 1951, Victor Emanuel Pereira, alias Victor

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Perry, hereinafter called Pereira, and Eugene H. Brading, alias James Bradley Lee, hereinafter called Brading, the two hereinafter referred to as defendants, devised and intended to devise a scheme and artifice to defraud Mrs. Gertrude J. Joyce, hereinafter called victim, and to obtain money and property by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made. Said scheme being to [fol. 185] represent, pretend and promise that Pereira was obtaining a divorce in Denver, Colorado, and was to receive as a settlement in said proceeding $48,000.00; that, in addition, the said Pereira was a wealthy businessman; that he was a hotel man of wide experience and had an option to buy the Washington Hotel in Greenville, Texas, for which he was to give $78,000.00; that it was a fine financial proposition and would earn a fine living for them (victim and Pereira) for the rest of their lives; that he needed immediate cash for this purpose and as a result thereof victim advanced to him $35,286.78. That Brading was a wealthy Texas oilman with many leases and holdings over Texas, New Mexico and other states; that he was about to close an oil lease in Texas, which would net immediate large profits and that, if victim would lend Pereira $5,000.00, Pereira would double his money in the very near future. With this understanding, victim lent defendants $5,000.00. Both defendants represented that Pereira was violently in love with victim, and as a result of said representation, victim was caused to take extended trips over the United States with one or both of the defendants and was induced to marry Pereira in Kansas City, Missouri, on the 25th day of May, 1951, and that on the 15th day of June, 1951, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, and in the jurisdiction of this Court, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, Pereira and Brading caused to be placed in an authorized depository for mail matter a letter addressed to the Citizens National Trust & Savings Bank, Los Angeles, California, to be sent and delivered by the Post Office Establishment of the United States.

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[fol. 186] Now, in the tenth count, which is being submitted to you, the grand jury charges that on or about June 15, 1951, Pereira and Brading, with unlawful and fraudulent intent, caused to be transported in interstate commerce, from the City of El Paso, El Paso County, Texas, within the El Paso Division of the Western District of Texas, to the City of Los Angeles, in the State of California, a security of the value of more than $5,000.00, to wit, a check drawn by Fewel and Company, Los Angeles, California, dated June 13, 1951, on the Citizens National Trust & Savings Bank of Los Angeles, California, payable to Mrs. Gertrude J. Joyce, 401 West 11th Street, Roswell, New Mexico, in the amount of $35,286.78, indorsed by Mrs. Gertrude J. Joyce and Victor Pereira, and the said Pereira and the said Brading well knew said security to have been obtained by fraud.

In the eleventh count, which is also submitted to you, it is charged that commencing on or about April 19, 1951, in El Paso County, Texas, within the El Paso division of the Western District of Texas, and continuing thereafter until on or about August 11, 1951, the defendants unlawfully and knowingly conspired to commit the various offenses against the United States which are fully described and set out in the three counts submitted to you of the indictment, and to effect the objects of their said conspiracy they committed the overt acts as set out in said eleventh count of the indictment, and, since you will have the indictment with you, the Court does not read the overt acts but you will find them in the eleventh count of the indictment.

[fol. 187] In order that you may first know the law of the United States covering the various offenses the Court reads you the statute and law of the United States covering the first count of the indictment, 18 United States Code, Sec. 1341, and the Court reads to you literally and verbatim so you will know what the law of the United States on that subject is, and I quote: "Frauds and swindles: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give

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away, distribute, supply, or furnish or procure for unlawful use any * * * obligation, security, or other article, or anything represented to be or intimated or held out to be such * * * spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing," shall be punished according to law.

I now read you the statute covering the tenth count of the indictment, which is Title 18, United States Code, Sec. 2314, of the law of the United States, and I will quote that portion of that which is applicable, which is that "whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money of the [fol. 188] value of $5,000.00 or more, knowing the same to have been stolen, converted, or taken by fraud * * *" shall be punished as the law provides.

The eleventh count in the indictment, which is the so-called conspiracy count, charges that said defendants unlawfully and knowingly conspired to commit various offenses against the United States which are fully described and set out in the three counts of the indictment submitted to you, and to effect the objects of their said conspiracy they committed certain overt acts which are set out in the eleventh count of the indictment. Title 18, United States Code, Sec. 371, provides that "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy" each shall be punished as provided by law.

In order that you may understand the subsequent parts of this charge the Court will give you certain definitions which will be used throughout the charge.

You are charged by the Court as a definition of the word "artifice" as used in Section 1341 of the Penal Code, just

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read to you, and the meaning you will give and apply to said word in your determination of the issues of fact herein, that the word "artifice" means a crafty device, an artful, ingenious or elaborate trick.

By the word "scheme" is meant a combination of things connected and adjusted by design, a system, a plan or [fol. 189] theory of something to be done, a design or project. Any scheme by which it is sought to obtain another person's money or property or a thing of value wrongfully, without giving him any equivalent for it, by the making of misrepresentations for the purpose of securing the same, is a scheme to defraud within the contemplation of the law, and you are so instructed by the Court.

As to the word "defraud" as it is used in the said section of the Penal Code of the United States which I have read to you, as applied to an artifice and scheme with intent to defraud, means an artifice, a trick or scheme by which a person is induced to part with his money or something of value, either voluntarily or in the hope of receiving benefits, and involves a breach of legal or equitable duty, trust or confidence generally imposed, injurious to another, and by which an undue advantage is taken of another.

Gentlemen, in this case the Court also gives you the definition of reasonable doubt. A "reasonable doubt" as the Court will use that term later is just exactly what the term implies, a doubt founded upon reason. It does not mean every conceivable kind of doubt; it does not mean a doubt that is purely imaginary or fanciful, or one that is merely captious or speculative; it simply means an honest doubt which appeals to reason and is founded upon reason. If, after considering the evidence in this case, you have such doubt in your mind as would cause you or any other reasonably prudent man to pause or hesitate before acting in a grave transaction in your own life, then you have such a doubt as the law contemplates is a reasonable doubt.

[fol. 190] As before stated, the three counts of the indictment submitted to you are the first, tenth and eleventh counts, the others having been dismissed. The first count charges a violation of the mail fraud statute to which I have referred. The alleged use of the United States mail in the furtherance of the alleged scheme to defraud is the

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gravamen of the alleged violation of the laws of the United States. The constituent elements of the offenses charged herein, to-wit: violation of the mail fraud statute, are two-fold. First, the devising, or intending to devise a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses; and, secondly, the use of the United States mail in furtherance of that scheme. The use of the mail may be employed by causing another to use the mail even though that party is not a party to the scheme and has no knowledge of its existence. In other words, the one who actually mails the letter or employs the use of the mail may be an entirely innocent agent. In this connection you are further charged that the scheme to defraud must be in existence and in the mind of the defendant or defendants when the use of the mails is employed.

Now, in applying the law as herein given you to the facts in this case, if you believe from the evidence in this case beyond a reasonable doubt, that the defendants, Pereira and Brading, devised a scheme and artifice to defraud, as alleged in the first count of the indictment, and for the purpose of effecting that scheme or artifice the mails of the United States were used as charged in the first count of the indictment, and letters were deposited, or caused to be deposited in the mails, within the jurisdiction of this Court [fol. 191] as alleged in the first count of the indictment, then it will be your duty to find the defendant or defendants guilty as charged on the first count,—each defendant to be considered separately on each respective count of the indictment.

On the other hand, if you do not so find from the evidence, beyond a reasonable doubt, that the defendants, Pereira and Brading, devised the scheme and artifice to defraud as charged in the first count in the indictment, or that the mails were used or caused to be used *in* charged in said count, then it will be your duty to find the defendants not guilty on the first count of the indictment.

The tenth count of the indictment charges the defendants, Pereira and Brading, with unlawful and fraudulent intent, caused to be transported in interstate commerce a security

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of the value of more than $5,000.00, and that the defendants well knew said security to have been obtained by fraud.

If you find and believe it is shown by the evidence beyond a reasonable doubt that the defendants, or either of them, caused to be transported in interstate commerce from the City of El Paso, Texas, to the City of Los Angeles, California, the security as shown in the tenth count of the indictment, said defendant or defendants well knowing said security to have been obtained by fraud, then you will find the defendant or defendants guilty on the tenth count of the indictment, each defendant to be considered separately. [fol. 192] On the other hand, if you do not so find, or you have a reasonable doubt thereof, then you will find the defendant or defendants not guilty on the tenth count.

The eleventh count of the indictment, as before stated, charges the defendants with unlawfully and knowingly conspiring to commit an offense against the United States, and I will further charge you regarding the offense of conspiracy.

If you should find and believe that it is shown by the evidence beyond a reasonable doubt that the defendants unlawfully and knowingly conspired to commit an offense or offenses against the United States which are fully described in the first and tenth counts of the indictment and to effect the objects of their said conspiracy committed any or all of the overt acts as charged in the eleventh count of the indictment, then you will find both defendants guilty on the eleventh count.

On the other hand, if you do not so find, or you have a reasonable doubt thereof, then you will find both defendants not guilty on the eleventh count.

You are charged that before a conviction would be warranted in this case under the eleventh count of the indictment you must find two essential elements, from the facts introduced on the trial of the cause, one, that an unlawful agreement or understanding between the defendants existed; and second, that some one or more of the overt acts as charged in such count of the indictment were committed as charged in said count of the indictment.

[fol. 193] It is your duty, gentlemen of the jury, to find what the facts are, and the Court's duty to instruct you

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what the law is, and your further duty, according to your oaths, to find a verdict solely upon the facts as they have been proven in the case and as you shall find them, and the law as given you in charge by the Court herein.

As before stated, a conspiracy is formed when two or more persons agree to do an unlawful act—in other words, when they combine to accomplish by their united action, a crime or unlawful purpose in violation of the laws of the United States. It is not necessary, to constitute a conspiracy, that two or more persons should meet together and enter into an explicit or formal agreement for the unlawful scheme, or that they should directly by words or in writing, state what the unlawful scheme or plan is to be, or as to the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. Of course, a mere discussion between parties about entering into a conspiracy, or as to the means to be adopted, for the performance of an unlawful act does not constitute a conspiracy, unless the scheme or some proposed scheme is assented to, or concurred in by the parties in some manner so that their minds meet for the accomplishment of the proposed unlawful act. A conspiracy may be inferred from circumstances. It is seldom that any one act taken by itself can prove a conspiracy, when a number of acts taken and considered together may. It takes only two to form a conspiracy. When an unlawful object is [fol. 194] sought to be effected and two or more persons act together in any way in pursuance of the purpose, and pursuing a preconceived plan to accomplish such purpose, should work together in any manner in furtherance of the unlawful scheme, of which they have knowledge, every such person participating is a party to the conspiracy no matter what part he takes in the execution of the object and plan and the conspiracy charged is an offense, whether its object be accomplished or not. Merely agreeing or combining together to commit an offense is sufficient, if any one of the parties has taken a step toward its execution, as charged in the eleventh count of the indictment.

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The Court is also going to instruct you on the law of principals, and does it by quoting verbatim from the statutes of the United States. Section 88, Title 18, of the Criminal Code of the United States, defines "principals" and says: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

Properly construed, this statute means that not only the person who directly commits an act constituting an offense against the United States is guilty of the offense, but that any person who aids, abets, counsels, commands, induces or procures such person to commit such act is also guilty of such offense to the same degree and extent as the person who directly commits the act.

[fol. 195] With regard to that element of the alleged offense which has to do with the placing of the letters in the United States mails, you are instructed that the Government is not required to show that the placing, if any, is actually done by the defendant or defendants personally; it is sufficient if the defendant or defendants cause said letters to be so placed in the mail, or cause to be delivered by mail the letters set out in the indictment. "Cause" is a word of very broad import and its meaning is generally known. It is used in this section in its well known sense of bringing about.

In connection with the matter of intent, gentlemen, I desire to give you some instructions. The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injury or defraud is presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed. It is a well settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action. If a man knows that the act he is about to commit will naturally or necessarily have the effect of injuring or defrauding another, and he voluntarily and intentionally does that act, he is chargeable in law, with

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the intent to injure or defraud. These terms used in the law mean nothing more than that general intent to injure or defraud which always arises, in contemplation of law, when one wilfully or intentionally does that which is illegal or fraudulent, and which, in its [fol. 196] necessary and natural consequence, must injure another.

You are instructed that each defendant is entitled to have you consider, and under these circumstances you will consider, each defendant's case separately from that of the other defendant. In other words, each defendant is entitled to the same consideration by you of his case as if he alone were on trial before you.

In passing on the guilt or innocence of a defendant in this case you are instructed that dishonorable conduct, or practice of deceit, fraud or misrepresentation, or unlawful acquisition of money by one or more of the defendants, is not sufficient to authorize a conviction on any counts in the indictment. Before you would be authorized to convict a defendant using such practices, you must find and believe beyond a reasonable doubt, that one defendant had associated himself with the other defendant charged in the indictment in devising or intending to devise a scheme or artifice to defraud; and that before such a defendant can be convicted, you must further find from the evidence beyond a reasonable doubt, that such defendant, for the purpose of executing said scheme or artifice, mailed or caused to be mailed, as to each count in the indictment that is submitted to you for determination, the mail items set out in each such count.

There is no presumption that a scheme or artifice to defraud, even if shown to have existed at one time, continued to exist at any later or subsequent time. Therefore, the Government's burden of proving [fol. 197] that the scheme or artifice alleged in the indictment was in existence at the time of the alleged use of the mails in the specific instance named in the indictment, is not sustained by evidence that such alleged scheme or artifice existed or might have existed at some time prior to such alleged use of the mails.

You will not consider or be influenced by any rulings the

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Court may have made on any motions that may have been presented on the trial of this case, or to the introduction of any testimony in the case, the rulings on same being on questions of law and not questions of fact, and it is the province of the jury to pass on questions of fact, and in your passing upon the same you are limited by the testimony as given from the witness stand on trial of the case and the law as given you in charge by the Court as applicable to the issues of fact submitted you for consideration in the case.

The fact that letters or items other than those specifically alleged in the indictment may have been mailed, or caused to be mailed by the defendants, or one of them, is entirely immaterial in determining whether there has been a criminal use of the mails by the defendants. On that question, you can consider only whether there is proof beyond a reasonable doubt and to a moral certainty, of the mailing of the specific letters and items expressly set forth and described in the indictment.

Upon arraignment each of the defendants entered a plea of not guilty to the indictment. An indictment, of course, is no evidence of his guilt. It is simply the charge brought by the United States grand jury [fol. 198] for the purpose of apprising the defendant and officers of the Court and jury of the nature of the charge.

As stated, upon arraignment, the defendants in this case have pleaded not guilty, and the burden, of course, rests upon the Government to establish every element of this case to the satisfaction of the jury beyond any reasonable doubt. The defendants, of course, in all criminal cases, are presumed to be innocent and that presumption remains with him and protects him throughout the trial of the case.

You are the sole judges of the credibility of the witnesses and the weight which is to be given to their testimony. In weighing the testimony of each witness, you should give it careful scrutiny and consider all the circumstances under which the witness testified; his appearance and demeanor on the stand; the relation which he bears to the Government or the defendant, the manner in which he might be affected by the verdict; his manner of testifying, his apparent candor and fairness, or lack thereof, the reasonable-

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ness or unreasonableness of his story, the extent to which he is corroborated or contradicted by other credible evidence, and, in short, any circumstances that tend to throw light upon his credibility. Applying the tests which I have just stated, it is for you to determine the weight which is to be given to the testimony of each witness.

Now, gentlemen, in the event you should find the defendant or defendants guilty on one or more counts of the indictment you are not to be concerned with the question of punishment. Your duties are simply [fol. 199] to determine the guilt or innocence of the defendants. The matter of punishment, if any is imposed, is an obligation which rests upon the shoulders and the conscience of the Court.

A form of verdict will be handed you by the Clerk, in which you will find each defendant guilty or not guilty on each of the three counts of the indictment submitted to you, as you find the facts to be under your oaths and consciences as jurors. The verdict, of course, must be unanimous.

You will retire in charge of the United States Marshal, select your own foreman, and consider your verdict.

Are there any exceptions?

Mr. Fryer: In view of the fact that so much of the indictment has been withdrawn from the jury, the defendants and each of them except to the indictment going to the jury room with the jurors, on the ground it would be prejudicial to these defendants to have the indictment when only three counts are submitted.

The Court: The Court overrules that.

Mr. Williams: I think so too. It doesn't sound serious to me.

The Court: No. They heard it when the defendants were arraigned, and they plead to it, so the objection is overruled.

[fol. 200] EXCEPTIONS OF DEFENDANTS TO CHARGE OF THE COURT, RULING THEREON

Mr. Milstead: I reserve my exception to the Court's not submitting all of the requested instructions, and particularly to the Court's not charging on the law of circumstantial evidence.

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We also object to the Court's not charging the jury on the law of accomplice witnesses, as applicable to the witness Gibson.

The Court: All right. All exceptions are overruled, and noted for the record.

Gentlemen of the jury, you will go with the United States Marshal and begin your deliberations.

The jury thereupon retired from the Court room at 3:55 o'clock P. M., and later the same day, at 4:40 o'clock P. M. returned to the Court room.

The Court: Gentlemen of the jury, the Court has here a note from your foreman. (Reading): "We, the jury, would like to have the Court re-define conspiracy. Signed Willard Kline, Foreman." Do I understand from that that is the only part?

The Foreman: Yes, it is, Judge.

The Court: I will give you all or any part of it.

[fol. 201] SUPPLEMENTAL CHARGE OF THE COURT

The eleventh count in the indictment, which is the conspiracy count, charges that said defendants unlawfully and knowingly conspired to commit various offenses against the United States which are fully described and set out in the three counts of the indictment submitted to you, and to effect the objects of their said conspiracy they committed certain overt acts which are set out in the eleventh count of the indictment. Title 18, United States Code, Section 371, provides, and I quote verbatim from the law of the United States, "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy" each shall be punished as provided by law.

You are charged that before a conviction would be warranted in this case under the eleventh count of the indictment, which is the conspiracy count, you must find two essential elements, from the facts introduced on the trial of the cause, one, that an unlawful agreement or understanding between the defendants existed; and second, that some one or more of the overt acts as charged in such count of

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the indictment were committed as charged in said count of the indictment.

As before stated, a conspiracy is formed when two or more persons agree to do an unlawful act—in other words, when they combine to accomplish by their united action, a crime or unlawful purpose in violation of the laws of the United States. It is not necessary, to constitute a conspiracy, that [fol. 202] two or more persons should meet together and enter into an explicit or formal agreement for the unlawful scheme, or that they should directly by words or in writing, state what the unlawful scheme or plan is to be, or as to the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. Of course, a mere discussion between parties about entering into a conspiracy, or as to the means to be adopted, for the performance of an unlawful act does not constitute a conspiracy, unless the scheme or some proposed scheme is assented to, or concurred in by the parties in some manner so that their minds meet for the accomplishment of the proposed unlawful act. A conspiracy may be inferred from circumstances. It is seldom that any one act taken by itself can prove a conspiracy, when a number of acts taken and considered together may. It takes only two to form a conspiracy. When an unlawful object is sought to be effected and two or more persons act together in any way in pursuance of the purpose, and pursuing a preconceived plan to accomplish such purpose, should work together in any manner in furtherance of the unlawful scheme, of which they have knowledge, every such person participating is a party to the conspiracy no matter what part he takes in the execution of the object and plan and the conspiracy charged is an offense, whether its object be accomplished or not. Merely agreeing or combining together to commit an offense is sufficient, if any one of the parties has taken a step towards its execution as charged in the eleventh count of the indictment.

[fol. 203] Does that cover your question?

The Foreman: Yes, sir.

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The Court: You may retire to the jury room and continue your deliberations.

The jury retired from the Court room at 4:50 o'clock P. M., and at 5:00 o'clock P. M. on the same date returned their verdict into Court, finding both defendants guilty on the first, tenth and eleventh counts of the indictment.

The Court: Gentlemen of the jury, is this your verdict, and so say you all?

The Jurors: Yes, sir.

The Court: The defendants will be committed to the custody of the United States Marshal, and the jury will be excused.

Be It Further Remembered, that on the 24th day of January, A. D. 1952, the above entitled and numbered cause came on for hearing for sentencing of said defendants, before the Honorable R. E. Thomason, a United States District Judge in and for the Western District of Texas, at El Paso, Texas; the Government being represented by Holvey Williams, Esq., Assistant United States Attorney, of El [fol. 204] Paso, Texas, and the defendants by W. H. Fryer, Esq. of El Paso, Texas, whereupon the following proceedings were had:

The Court: Mr. District Attorney, do you have something to present to the Court this morning?

Mr. Williams: I believe sentencing in No. 48,729 Criminal, Pereira and Brading.

The Court: Let the defendants and their counsel come around. Does the District Attorney have anything to say regarding sentencing these defendants?

Mr. Williams: Your Honor, I know you have a full and complete report from your Probation Officer, and you have also heard the facts developed here at the trial. I think proper though I should emphasize to you the great planning and scheming, and the fact this planning and scheming existed for two months, and that these defendants both worked together over that period of about sixty days in perpetrating this crime, and in my opinion it is quite serious and required a great deal of deliberation and planning. I think it not only merits but deserves a substantial sentence.

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The Court: Mr. Fryer, do you wish to make a statement in behalf of your clients?

[fol. 205] Mr. Fryer: Yes, Your Honor. There is very little I can add to what the Court has before him from the Probation Officer. The defendant Pereira, I understand, had a check transaction or two some years ago involving misdemeanors, which is the only record of conviction. The other defendant has had a conviction with reference to some gasoline stamps some eighteen years ago or more. I believe it has been about eighteen years. Outside of that I know the Court is disposed to consider the past record of these men. As to the facts, the Court has heard them. I have nothing to say about them.

The Court: Do defendants, or either of them, desire to make a statement in his own behalf?

Defendant Pereira: No, sir.

Defendant Brading: No, sir.

The Court: Any statement or comment concerning any phase of the case or your past record?

Defendant Pereira: No, sir.

Defendant Brading: No, sir.

[fol. 206] STATEMENT MADE BY THE COURT

The Court: Well, as your able counsel has said, the Court has before him an exhaustive and in many respects interesting report here from the Probation Officer and the F. B. I. The Court has given these reports careful study and given the matter of sentencing in this case serious consideration. It is unfortunate, of course, that these defendants, and likewise society, that young men of your intelligence, personality and talents don't direct same in lawful pursuits rather than being mixed up with the law at different times, and above all going out to defraud a widow of a large sum of money, in this particular case $48,000.00, in which the jury has found you guilty on three counts.

Now, the report makes comment here, the reports comment on what they call your modus operandi in this case, and the indications are in other cases, that you posed as wealthy business men or oil men, and then you would go to work on some rich widow or other wealthy person whom you regarded as gullible prospects, and after you began to influ-

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ence them you lavished them with your attentions, showered them with expensive gifts and constant entertainment, and make ardent love, and if necessary resort to marriage, as one of you did in this case; being more or less expert in the use of spurious telegrams and long distance calls, and forged recommendations. This report also indicates you had close acquaintance, even more than that association with three of the most noted confidence men in all of the country, each of whom has long criminal records, Paul Augustus King, Joe P. Dowding and Sidney (Doc) Soloway, with whom you associated, it seems, very freely. That defendant Brading's record here indicates you had an elderly [fol. 207] widow, Mrs. Ruth Thomas, in Missoula, Montana, in line for a fraud of $12,000.00, which was not consummated.

The record shows that defendant Pereira is thirty-three years old, born in Fort Jones, California, that he graduated from high school at Dansmuir, California, and later attended Auburn Junior College for two years. As your counsel suggests—this is Pereira now—in Oakland, California, this record shows for bad checks—this was in 1940—you served three months in jail, and were placed on probation for three years. This record also shows you had six months in Alameda, California, on bad checks. Your record shows you deny that, that it was the same offense, and the Court is not interested in whether it was or not. Defendant Pereira married four times and divorced four times. The record shows one of your former wives now goes by the name of Bonnie Cranor and resides in Sacramento, California. That this Cadillac that you defrauded Mrs. Joyce out of, Pereira turned over to this former wife Bonnie Cranor, and also deposited $2,000.00 of this money to the account of Bonnie Cranor in the Ohio National Bank of Columbus, Ohio, she being your third wife. The record shows that you were a salesman—you don't say what of—but that your ususal business is that of a professional gambler; saw no service in the Army, Navy or Marine Corps, but did join the Merchant Marine and served one year in 1944 and 1945, from which service you received an honorable discharge. The record also shows that after you got this $35,000.00 in currency here on Mrs. Joyce's check

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you went to Oklahoma City in two days, I believe, and lived with some other woman in the Skirvin Hotel, and you moved on into a fashionable suburban district [fol. 208] of Boston, to Hopedale, Massachusetts, where you later became engaged to a nineteen year old daughter of a very wealthy manufacturer.

That seems to be the high spots of the record of the defendant Pereira.

This report on Brading shows that he is thirty-seven years old, born at Atchison, Kansas, and completed high school; later moved with his parents to San Francisco, California. Claims to be married at this time, married in Durant, Oklahoma, but he had had a divorce before that. Never worked for anybody as an employee; at least he was unable to furnish the officers the names of any employers; claims he formerly operated restaurants in Miami, Florida, and Washington, but states his chief occupation is buying and selling oil leases, although the record indicates his principal business was that of a professional gambler. He had no service in the Army during World War II at any time. The record shows he has a good long previous criminal record, beginning in 1934. He was convicted of second degree burglary in Hutchinson, Kansas, in 1934, and sentenced to from five to ten years, paroled after serving thirty months; convicted in 1941 at Miami, Florida, for operating a gambling house, sentenced to six months or $200.00 fine, and fine paid; in 1942 convicted in Miami, Florida, for auto theft, for which he received a six months suspended sentence. Then in 1943, during the war, he was convicted of possession of black market gasoline ration coupons, and still later as a probation violator in Miami.

[fol. 209] That seems to be the general record of these defendants. The Court can't find anything to commend them to special consideration.

Mr. Williams: Our record is conflicting as to which one was engaged to Miss Draper, but as best I can find it is Brading rather than Pereira.

Mr. Fryer: I can state neither one of them was engaged. This nineteen year old girl left New York a day or two before these men were arrested. Now, as to the registration, if I may remind the Court of that, the Court will recall

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that card,—that was to increase the price of the room, and it was written in "Mrs." in the handwriting of the witness who testified, and he never saw the woman at that tourist court with this man. It was for the purpose of raising the price of the room; so I hope the Court does not consider that serious.

The Court: All right, the Court will not consider it because there is enough other things to consider without it. The Court recalls that counsel for defendant argued with considerable force here his position that the first count and the tenth count, on which they were convicted, covered the same transaction. Although the Court disagreed then, and does now, as to the law, but that question has been raised as a legal proposition by counsel for defendant. The defendants were convicted on the first count of the indictment, the tenth count of the indictment, and the eleventh count of the indictment.

Anything else by either counsel?

[fol. 210] Mr. Fryer: No, Your Honor.

The Court: It is the judgment and sentence of this Court that the defendants, and each of them, be sentenced to confinement for five years on the first count, and ten years on the tenth count, and these two counts to run concurrently. It is also the judgment and sentence of the Court that the defendants, and each of them, be sentenced to confinement for two years on the eleventh count, said sentence to begin to run from the expiration of the sentence imposed under the tenth count.

Mr. Fryer: Would the Court indicate whether or not he would permit enlargement bond on appeal, state an amount?

The Court: Yes. The Court will set the bond for each defendant at $25,000.00.

* * * * * * * *

Special charges requested by Defendants and ruling thereon, Omitted from the printed record being heretofore copied at page 173.

* * * * * * * *

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[fol. 211] NOTE FROM JURY—Filed January 15, 1952

We the jury would like to have the Court re-define conspiracy.

(S.) Willard Kline, Foreman.

IN UNITED STATES DISTRICT COURT

VERDICT OF THE JURY—Filed January 15, 1952

We, the jury, find the defendant Victor Emanuel Pereira guilty, as charged in the first count of the indictment; and guilty, as charged in the tenth count thereof.

We further find defendant Eugene H. Brading guilty, as charged in the first count of the indictment; and guilty, as charged in the tenth count thereof.

We further find defendants, Victor Emanuel Pereira and Eugene H. Brading, guilty, as charged in the eleventh count of the indictment.

(S.) Willard L. Kline, Foreman.

[fol. 212] IN UNITED STATES DISTRICT COURT

JUDGMENT, SENTENCE, AND ORDER—Filed January 24, 1952

On Monday, January 14th, 1952, this cause coming on to be heard, came the United States by their District Attorney, and came also the defendants, Victor Emanuel Pereira and Eugene H. Brading, each in proper person and by their attorneys, W. H. Fryer and Coyne Milstead, Esquires, and thereupon the said defendants were arraigned at the bar of the Court when all parties announced ready for trial; and the defendants, having heard the indictment read, entered their pleas of not guilty to the charges contained therein, and said defendants presented their motion to dismiss the indictment, which motion was by the Court overruled. Thereupon a jury, to wit, Willard L. Kline and eleven others, was duly selected, impaneled and sworn, and the trial proceeded with the taking of testimony on behalf of the United States, and at the conclusion of said testimony

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and upon motion of the District Attorney, it is ordered by the Court that the charges contained in the second, third, fourth, fifth, sixth, seventh, eighth and ninth counts of the indictment be, and the same are hereby, dismissed, and the defendants presented a further motion for judgment of acquittal, which motion was by the Court overruled. The trial then proceeded, but no testimony was offered by the defendants; whereupon, the jury, having heard the indictment read and the defendants' pleas of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired on January 15th, 1952, in charge of the proper officer, to consider of their verdict, and afterwards were brought into [fol. 213] open Court by the proper officer, the defendants and their counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is now here entered upon the minutes of the Court, to wit:

"Verdict of the Jury in the case of The United States vs. Victor Emanuel Pereira and Eugene H. Brading, No. 48729 Criminal.

We, the jury, find defendant Victor Emanuel Pereira guilty, as charged in the first count of the indictment; and guilty, as charged in the tenth count thereof. We further find defendant Eugene H. Brading guilty, as charged in the first count of the indictment; and guilty, as charged in the tenth count thereof.

We further find defendants, Victor Emanuel Pereira and Eugene H. Brading, guilty, as charged in the eleventh count of the indictment.

(S.) Willard L. Kline, Foreman."

Wherefore, it is considered and adjudged by the Court that the defendants, Victor Emanuel Pereira and Eugene H. Brading, are Each guilty, as found by the jury, of the offense of having, commencing on or about April 19, 1951, and continuing thereafter until on or about August 11, 1951, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, devised and intended to devise a scheme and artifice to defraud Mrs. Gertrude J. Joyce and to obtain money and property by means

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of false and fraudulent pretenses, representations [fol. 214] and promises, well knowing said pretenses, representations and promises to be false, and in furtherance of said scheme on the 15th day of June, 1951, caused to be placed in an authorized depository for mail matter a letter addressed to the Citizens National Trust & Savings Bank, Los Angeles, California, to be sent and delivered by the Post Office Establishment of the United States, as charged in the first count of the indictment, and

of the offense of having, on or about June 15, 1951, within the venue and jurisdiction aforesaid, with unlawful and fraudulent intent, caused to be transported in interstate commerce, from the City of El Paso, El Paso County, Texas, to the City of Los Angeles, in the State of California, a security of the value of more than $5,000.00, to wit, a check drawn by Fewel and Company, Los Angeles, California, dated June 13, 1951, on the Citizens National Trust & Savings Bank of Los Angeles, California, payable to Mrs. Gertrude J. Joyce, 401 West 11th Street, Roswell, New Mexico, in the amount of $35,286.78, indorsed by Mrs. Gertrude J. Joyce and Victor Pereira, and the said defendants well knew said security to have been obtained by fraud, as charged in the tenth count thereof, and

of the offense of having, commencing on or about April 19, 1951, within the venue and jurisdiction aforesaid, and continuing thereafter until on or about August 11, 1951, unlawfully and knowingly conspired to commit various offenses against the United States, and to effect the objects of their said conspiracy they committed various overt acts, all as described in the eleventh count of the indictment. [fol. 215] And sentence was deferred for pre-sentence investigation.

And now on this 24th day of January, 1952, the said defendants having been brought before the bar of the Court for the purpose of receiving sentence, and being asked by the Court if they had anything to say why the sentence of the law should not be pronounced against them, and they answered nothing in bar thereof:

It is the order and sentence of the Court that the defendants, Victor Emanuel Pereira and Eugene H. Brading, for the offenses by them committed, Each be imprisoned for the

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period of Five (5) Years on the first count, Ten (10) Years on the tenth count to run concurrently with that imposed under the first count and Two (2) Years on the eleventh count to begin at the expiration of the sentence imposed under the tenth count in an institution to be designated by the Attorney General of the United States, and that said defendants be, and they are hereby, committed to the custody of said Attorney General or his authorized representative.

It is further ordered by the Court that said defendants be temporarily held in custody by the United States Marshal for the Western District of Texas, pending definite designation of the place of confinement for service of the sentences herein imposed, a certified copy of this order to be authority to said Marshal for his action in the premises.

It is further ordered by the Court that the defendants herein be temporarily committed to the county [fol. 216] jail of El Paso County, Texas, there to be held pending the time allowed by law for taking appeal, and if appeal be taken, the appellants shall be similarly held in said county jail pending the determination thereof, unless bail is allowed or election made to enter upon the service of sentences.

Ordered in open Court at El Paso, Texas, this the 24th day of January, 1952.

(S.) R. E. Thomason, United States District Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL OF EUGENE H. BRADING—Filed January 28, 1952

Name and address of Appellant: Eugene H. Brading, 85 Henry Street, San Francisco, California.

Name and address of Appellant's attorneys: William H. Fryer and Coyne Milstead, 701 Bassett Tower, El Paso, Texas.

Offense: Mail Fraud: (Sec. 1341, Title 18, United States Code; Transportation of stolen property: (Sec. 2314, Title

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18 United States Code; Conspiracy: (Sec. 371, Title 18 United States Code:

Date of judgment: January 24, 1952.

Description of judgment: A sentence of five years on Count One, in an institution of the penitentiary type; a sentence of ten years on Count Ten, in an [fol. 217] institution of the penitentiary type concurrent with the sentence on Count One. On Count eleven, a sentence of two years cumulative with the sentence imposed under Counts One and Ten.

Name of institution where now confined, if not on bail: El Paso County jail, El Paso County, Texas.

I, the above named Appellant hereby appeal to the United States Court of Appeals for the Fifth Circuit from the above stated judgment.

Dated: January 25th, 1952.

(S.) Eugene H. Brading, Appellant.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL OF VICTOR EMANUEL PEREIRA—Filed January 28, 1952

Name and address of Appellant: Victor Emanuel Pereira, 1441 36th Street, Sacramento, California.

Name and address of Appellant's attorneys: William H. Fryer and Coyne Milstead, 701 Bassett Tower, El Paso, Texas.

Offense: Mail Fraud: (Sec. 1341, Title 18 United States Code; Transportation of stolen property: (Sec. 2314, Title 18 United States Code: Conspiracy: (Sec. 371, Title 18 United States Code:

[fol. 218] Date of judgment: January 24, 1952.

Description of judgment: A sentence of five years on Count One, in an institution of the penitentiary type; a sentence of ten years on Count Ten in an institution of the penitentiary type concurrent with the sentence on Count

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One. On Count Eleven, a sentence of two years cumulative with the sentence imposed under Counts One and Ten.

Name of institution where now confined, if not on bail: El Paso County Jail, El Paso County, Texas.

I, the above named Appellant hereby appeal to the United States Court of Appeals for the Fifth Circuit from the above stated judgment.

Dated: January 25th, 1952.

(S.) Victor Pereira, Appellant.

Cost Bond on Appeal for $250.00 approved and filed February 6, 1952 omitted in printing.

[fols. 219-220] Cost Bond on Appeal for $250.00 approved and filed February 6, 1952 omitted in printing.

[fols. 221-222] In United States District Court

Order Extending Time to File Record—Filed February 8, 1952

On consideration of the application of Defendants for an extension of time within which to file the record herein and docket the appeal with the United States Court of Appeals for the Fifth Circuit;

It is Ordered by the Court that an additional period of 60 days from and after the expiration of 40 days commencing January 25, 1952, be and is hereby granted Defendants within which to docket the appeal and file the record with the Appellate Court.

Done this 8th day of February, 1952.

(S.) R. E. Thomason, Judge.

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IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE RECORD—Filed March 5, 1952

On this fifth day of March, 1952, and within forty days from the date notice of appeal was filed herein, [fols. 223-224] it is Ordered by the Court that an additional period of fifty days be and it is hereby granted the defendants, Victor Emanuel Pereira and Eugene H. Brading within which to file the record herein with the United States Court of Appeals for the Fifth Circuit. The additional time granted does not exceed ninety days from the date of the filing of the notice of appeal herein by each defendant.

(S.) R. E. Thomason, Judge.

IN UNITED STATES DISTRICT COURT

PRAECIPE (Omitted in printing)

[fols. 225-230] Bail Bond on Appeal for $15,000.00 approved and filed April 3, 1952 omitted in printing.

[fols. 231-278] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 232] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13980

VICTOR EMANUEL PEREIRA and EUGENE H. BRADING

versus

UNITED STATES OF AMERICA

MINUTE ENTRY OF ARGUMENT AND SUBMISSION DATED DECEMBER 10, 1952, OMITTED IN PRINTING

[fol. 233] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13980

VICTOR EMANUEL PEREIRA and EUGENE H. BRADING, Appellants,

versus

UNITED STATES OF AMERICA, Appellee

Appeals from the United States District Court for the Western District of Texas

OPINION—Filed March 11, 1953

Before Hutcheson, Chief Judge, and Holmes and Rives, Circuit Judges

RIVES, Circuit Judge:

The indictment charged the defendants with nine violations of the mail fraud statute, 18 U. S. C. A. 1341, a violation of the National Stolen Property Act, 18 U. S. C. A. 2314, and conspiracy to commit the aforesaid substantive [fol. 234] offenses, 18 U. S. C. A. 371. Eight of the counts under the mail fraud statute were dismissed by the district court leaving Count One under the mail fraud statute, Count Ten under the National Stolen Property Act, and

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Count Eleven, the conspiracy charge. The jury found the defendants guilty as charged and the court sentenced each of them to the maximum confinement under Count One, five years; the maximum confinement under Count Ten, ten years, to run concurrently with the sentence under Count One; and a cumulative sentence of two years confinement under Count Eleven.

The errors relied on arise out of rulings on the sufficiency of the indictment, the competency of a witness, admissibility of testimony, instructions to the jury, failure to require the Government to elect as between Counts One, Ten, and Eleven, plurality of punishment for the same offense, and sufficiency of the evidence to support the verdict and judgment.

The first count of the indictment brought under 18 U. S. C. A. 1341 charges that between certain dates the defendants devised and intended to devise a scheme and artifice to defraud a woman victim and to obtain money and property by means of false and fraudulent pretenses. The alleged scheme is described substantially as follows: to represent that Pereira was obtaining a divorce and was to receive as a settlement in said proceedings $48,000.00; that he was a wealthy businessman, a hotel man of wide experience with an option to buy the Washington Hotel in Greenville, Texas, for which he was to pay $78,000.00; that such was a fine financial proposition and would earn a fine [fol. 235] living for the victim and Pereira for the rest of their lives; that he needed immediately cash for this purpose and as a result thereof, that the victim advanced to him $35,286.78; that Brading was a wealthy Texas oil man with many leases and holdings over Texas, New Mexico and other states; that he was about to close an oil lease in Texas which would net immediately large proceeds; and that, if the victim would lend Pereira $5,000.00, Pereira would double his money in the very near future; that with this understanding the victim lent the defendants $5,000.00; that both the defendants represented that Pereira was violently in love with the victim and, as a result of said representation, the victim was caused to take extended trips over the United States with one or both of the defendants and was induced to marry Pereira in Kansas City, Missouri, on the 25th day of May, 1951.

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Count One further charges that for the purpose of executing said scheme and artifices and attempting so to do, the defendants, Pereira and Brading, caused to be placed in the mails at El Paso, Texas, a letter addressed to the Citizens National Trust & Savings Bank, Los Angeles, California.

The tenth count brought under 18 U. S. C. A. 2314 charges that on or about June 15, 1951, the defendants with unlawful and fraudulent intent caused to be transported in interstate commerce from El Paso, Texas, to Los Angeles, California, a security of the value of more than $5,000.00 knowing said security to have been obtained by fraud. The evidence disclosed that the security and the transportation described in the tenth count constituted the mail item described in the first count.

[fol. 236] The eleventh count brought under 18 U. S. C. A. 371 charges that the defendants conspired to commit the substantive offenses described in the preceding counts.

The victim was past 55 years of age, a widow who had been married twice. Under the will of her second husband, some years older than she, she had received a considerable estate. She and the defendant Pereira were married on May 25, 1951. Subsequently, on November 16 of the same year, after the indictment was returned but before the trial, they were divorced. Most of her testimony was admitted over the objections of the defendant Pereira as to her competency to testify to matters occurring after the marriage and to confidential communications with her husband. Some of her testimony was objected to by the defendant Brading also on the ground that as to him it was hearsay.

The victim and her young half sister had taken a trip to El Paso, Texas, where the half sister was to be treated by a dentist. As they stopped their automobile in front of the Del Norte Hotel, they were greeted by a stranger, the defendant Brading, who in a short time introduced them to his companion, the defendant Pereira. Within an hour the four were drinking cocktails in the Del Norte Hotel and in a couple of hours they were on a party in Juarez. The victim testified that she thought fate had brought them together and she invited these men to be house guests at her home in Roswell, New Mexico, and while there Pereira received a telegram signed Curtis that

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his divorce would be granted effective April 28; that distribution of the property would be made May 25, and his net share would be $48,895.00.

[fol. 237] A few days later Brading proposed that the victim let Pereira have $5,000.00 for oil leases on which he could double his money and that Pereira would pay her back. After the victim had given her check for that sum Brading left Roswell. Several days later she and Pereira returned to El Paso where Brading joined them. There were more parties in Juarez and they returned to Roswell for a birthday party for Pereira on May 3.

With the proceeds of a $1,000.00 check which the victim had cashed and given to Pereira, she and Pereira took a trip to Wichita Falls. Brading joined them there and the three drove to Dallas where the victim shopped at Neiman-Marcus and other stores. They left Brading at Dallas and went to Hot Springs for several days and then on to Kansas City. At the hotels in each place they observed the proprieties of registering in their own names for separate rooms. They were married at Kansas City on May 25 with the victim's half sister and Brading attending the wedding.

The victim then gave Pereira $6,956.55 to buy a $4,750.00 Cadillac automobile in which the four returned to Texas. Pereira kept the change. At Greenville they looked at the Washington Hotel and drove on to Dallas where Pereira discussed with her the purchase of the hotel on which Pereira showed her a supposed option and later a telegram from his supposed broker, E. J. Wilson, 1414 Electric Building, Fort Worth, Texas, granting a seven day extension. The victim told him that she had some securities on which she was not making a large return; that she knew him to be capable and trusted him; and that she could sell the securities. She had her broker in Los Angeles, Cali-[fol. 238] fornia, sell some securities and received from him a check for $35,286.78. She and Pereira went to El Paso where she endorsed the check to Pereira, who placed it with the bank for collection, for which purpose it was mailed to the bank on which it was drawn in Los Angeles, California. On their return to Roswell they met Brading. About 5 o'clock on the morning of June 19, Brading and Pereira drove the Cadillac out of Roswell ostensibly to pick up some

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oil leases. On the same day Pereira collected the proceeds of the $35,286.78 check which had been cleared. The victim did not see either of them again until seven months later when they came into the courtroom.

The clerks of the Denver courts testified that there was no divorce case there to which Pereira was a party. The owner and the operator of the Washington Hotel in Greenville, Texas, denied knowledge of any option to Pereira or any negotiations for the purchase of the hotel. Witnesses from the Western Union testified that the Curtis Telegram and the Wilson telegram were transmitted over their facilities. A handwriting expert expressed the opinion that the Curtis telegram was printed by Pereira. The operator of a telephone answering service at 1414 Electric Building, Fort Worth, Texas, identified Brading as a customer who had registered with her under the name of E. J. Wilson. Bank employees identified the broker's check as having been placed with them by Pereira for collection; that it was mailed to the Los Angeles bank upon which it was drawn for payment; that it was paid and a cashier's check was issued to Pereira and he cashed that check.

[fol. 239] Count One is attacked as duplicitous, as charging two separate and distinct schemes and artifices to defraud; one to get the $35,286.78 for the hotel and the other, the $5,000.00 for the oil leases. We think it clear that the charge was of only one scheme and that to defraud the victim of money. It is not material that different means were alleged to effectuate the same scheme nor that false representations were alleged concerning each defendant. *Mansfield* v. *United States*, 155 F. 2d. 952; *Kniken* v. *United States*, 196 F. 2d. 223 (approving district court's opinion 101 F. S. 929).

It is insisted that a plurality of offenses was charged, that since the Government was not compelled to elect upon which it relied, double punishment was assessed against each appellant for a single criminal act. A conviction under Count One of the indictment required proof that the defendants devised the scheme to defraud, and that in executing the scheme they caused the mails to be used as alleged. A conviction under Count Ten required proof that the defendants fraudulently caused to be transported in interstate commerce a security of the value of more than $5,000.00 as alleged. A defendant cannot be put in jeopardy

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for the same offense more than once, but a single act may constitute a number of offenses and, if proof of an additional fact is necessary to constitute one of the offenses, an acquittal or conviction under the other does not exempt the defendant from such prosecution. *Gavieres* v. *United States*, 220 U. S. 338. Each of the substantive offenses charged could be committed by a single individual, and the conspiracy was separate and distinct from the substantive offenses. *United States* v. *Momsen*, 115 F. 2d. 635; *Gebardi* [fol. 240] v. *United States*, 287 U. S. 112, 122; *Pinkerton* v. *United States*, 328 U. S. 640.

It is insisted that the victim was not a competent witness on matters transpiring during the marriage and that confidential communications between her and her husband were privileged and inadmissible. Under Rule 26, Federal Rules of Criminal Procedure, these matters are governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The marriage having been dissolved by a decree of divorce after the indictment but prior to the trial, the wife became a competent witness generally, but her competency to testify to any communications between husband and wife which were confidential and privileged remained unaffected by the divorce. 58 Am. Jur., Witnesses, Sec. 379; *United States* v. *Walker*, 176 F. 2d. 564, 568; Annotation, 95 L. ed. 310; VIII Wigmore on Evidence (3rd. ed.) Sec. 2341.

Since *Funk* v. *United States*, 290 U. S. 371, the wife has been competent to testify for her husband in criminal trials in the Courts of the United States; *Price* v. *United States*, 68 F. 2d. 133, 135. The extent to which she is now a competent witness against her husband has been the subject of much discussion. See *United States* v. *Walker*, 176 F. 2d. 564; *United States* v. *Lutwak*, 195 F. 2d. 748, 758; Annotation, 95 L. ed. 309, et seq. It is sufficient for us to mark the exception that is decisive of the question in this case. The evidence went to show that, insofar as the defendant Pereira was concerned, the marriage relation was merely a sham and a pretense dishonestly assumed as a means of perpetrating a fraud, and he will not be per- [fol. 241] mitted to use the relation to close the lips of the victim and to shield himself from the truth. See *Clark* v.

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United States, 289 U. S. 1, 14; *Marclay* v. *Commonwealth* (Ky.), 76 S. W. 4, 5; Cf. VIII Wigmore on Evidence, (3rd. ed.) Sec. 2230, Note 3; Sec. 2298, *United States* v. *Graham*, 87 F. S. 237, 241, 242.

There was ample evidence of the conspiracy between Pereira and Brading, and Pereira's conversations with the victim pursuant to that conspiracy were not hearsay as to Brading. See *May* v. *United States*, 175 F. 2d. 994; *Montford* v. *United States*, No. 14,065, Ms. decided December 29, 1952.

The witness Gibson was not shown by the evidence to be a guilty participant in the fraud or an accomplice, and an instruction as to the credit to be given to his testimony was not required. See *McLendon* v. *United States*, 19 F. 2d. 465; 22 C. J. S., Criminal Law, Sec. 786.

This Court has held that when the evidence discloses ill will, prejudice and bias, it is error for the court to refuse a proper requested charge as to the consideration by the jury of such bias or prejudice on the part of a witness. *Coleman* v. *United States*, 167 F. 2d. 837, 841. In the present case, the victim is not *per se* a biased or prejudiced witness. In her testimony she apparently exhibited no venom, ill will or hatred. There was no attempt to disprove anything that she said. The district judge did charge the jury generally:

> "In weighing the testimony of each witness, you should give it careful scrutiny and consider all the circumstances under which the witness testified; his [fol. 242] appearance and demeanor on the stand; the relation which he bears to the Government or the defendant, the manner in which he might be affected by the verdict; his manner of testifying, his apparent candor and fairness, or lack thereof, the reasonableness or unreasonableness of his story, the extent to which he is corroborated or contradicted by other credible evidence, and, in short, any circumstances that tend to throw light upon his credibility. Applying the tests which I have just stated, it is for you to determine the weight which is to be given to the testimony of each witness."

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Under the circumstances of this case, we think that was sufficient, and that a charge on the assumed bias or prejudice of the victim as a witness was not required.

Instruction No. 1 requested by the defendants read in pertinent part as follows:

> "Gentlemen of the Jury:
>
> "The defendant in a criminal prosecution is not called upon to prove his innocence, nor need he do so in order to secure an acquittal, but such acquittal must necessarily occur unless the prosecution has proven the defendant's guilt beyond a reasonable doubt.

In its oral charge and in given requested charges the district court instructed the jury as to the burden of proof resting on the Government to establish the defendant's guilt by the evidence beyond a reasonable doubt. The appellants insist that the jury should have been affirmatively instructed, that the failure of a defendant to avail himself of the privi- [fol. 243] lege of testifying does not create any presumption against him. 18 U. S. C. A. Sec. 3481; *Bruno* v. *United States*, 308 U. S. 287. The answer is that no such charge was requested as in *Bruno* v. *United States, supra;* see *Chadwick, et al.* v. *United States*, 117 F. 2d. 902, 904; nor was any exception reserved to the court's oral charge for failing so to instruct the jury; Rule 30, Federal Rules of Criminal Procedure.

The court did not err in declining to give the usual charge on circumstantial evidence, because the circumstances were only corroborative and the case was established by direct testimony if believed by the jury, 23 C. J. S. Criminal Law, Sec. 1250; *Campbell* v. *United States*, 47 F. 2d. 70, 71.

Other requested charges were substantially covered by the court's oral charge or by given requested charges or were properly refused.

The evidence was ample to support the verdict of guilty under each count of the indictment. The evidence went to show that Brading sent a fake telegram authorizing a seven day extension of the supposed option to purchase the hotel signed "E. J. Wilson", a fictitious broker, on June 13, 1951, the same day on which the victim's real broker mailed her the $35,286.78 check from California. When the victim re-

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ceived that check, she endorsed it over to Pereira who in turn endorsed it and it was mailed back to the California bank on which it was drawn. The return of that check from Texas to California constitutes the mailing referred to in the First Count, and the interstate transportation of a security with knowledge that it had been obtained by fraud [fol. 244] referred to in the Tenth Count. In mailing the check back to the bank in California on which it was drawn, the El Paso, Texas, bank sent "instructions to wire fate", meaning to wire whether the item was paid or not. Upon receiving a telegram stating that the check had been paid, the bank in El Paso gave Pereira its cashier's check for $35,286.01, which Pereira promptly cashed on June 19, 1951. At about 5 o'clock on that same morning, Pereira and Brading had driven the Cadillac out of Roswell, and according to their hopes, out of the victim's life. The evidence is clear and convincing that Brading was a guilty partner in the crime from the day he introduced the victim to Pereira on up to the culmination of the fraud. Brading's participation meets the test formerly prescribed in *Nye & Nissen* v. *United States*, 336 U. S. 613, 619:

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed'. L. Hand, J., in United States v. Peoni, 100 F. 2d. 401, 402."

It is clear also that the perpetration of the fraudulent scheme contemplated the use of the mails in transporting checks and securities between California and Texas. See *Mansfield, et al.* v. *United States*, 155 F. 2d. 952, 955; *United States* v. *Cohen*, 145 F. 2d. 82, 90; *Hart* v. *United States*, 112 F. 2d. 128, 131.

[fol. 245] It is said, however, that Section 2314 does not now cover one who "causes to be transported" in interstate commerce a security knowing the same to have been obtained by fraud. As the Section appeared in the 1940 edition of the United States Code, Title 18, Section 415, the word "transport" was each time followed by "or cause to be transported" (See also 53 Stat. 1178). The reviser's

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note to the present Section, 18 U. S. C. A. 2314, comments that such reference "was omitted as unnecessary in view of definition of 'principal' in Section 2 of this Title." That same stereotyped explanation appears in the reviser's note to numerous sections throughout the criminal code.[1] If contrary to that explanation, we assume that the Section does not now cover a person who "causes to be transported", then a defendant would go free from punishment under this section who carried out his fraudulent plans by the use of the mails or of an innocent common carrier. It seems clear to us that no such radical change in the statute was intended by the revision.

Section 2 of Title 18 now reads as follows:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

[fol. 346] Subsection (b) was added in 1948 and amended in 1951.

The reviser's note to Section 2 calls attention that, "Section 2(b) is added to permit the deletion from many sections throughout the revision of such phrases as 'causes or procures'." As heretofore noted (see footnote 1), an examination of many sections defining federal crimes corroborates this statement. It follows that Section 2(b) is not restricted to the subject of parties responsible for crimes, but that, in the present instance and in many others, it enters into the very definition of the crime itself. To hold otherwise would

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[1] For example, checking hurriedly through Sections 201 to 1001 of Title 18, that is true as to the following sections: 201, 204, 206, 217, 242, 287, 288, 289, 331, 443, 474, 478, 481, 482, 485, 486, 487, 488, 489, 490, 491, 493, 494, 495, 498, 500, 501, 506, 508, 509, 549, 597, 832, 833, 834, 835, 871, 876, 877, 961, 962, 1001. It is true doubtless as to many other sections in Title 18 between Sections 1001 and the concluding Section 5037.

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be to change the meaning of "many sections throughout the revision" contrary to the clearly expressed intention of the reviser.

The reviser's note further calls attention that Section 2(b) removes all doubt that one who "causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal", to accord with several decisions including *United States vs. Giles*, 300 U. S. 41, reversing *Giles vs. United States*, (5 Cir.), 84 F. 2d 943. In that respect, Section 2(b) does not enlarge criminal liability, but is merely a restatement of existing law. (See *United States vs. Paglia*, 190 F. 2d 445, 448; *United States vs. Chiarella*, 184 F. 2d 903, 909, 910.) Over a century and a quarter ago, Mr. Justice Story speaking for the Court said:

> "It is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, if it be done, is guilty of the crime, and the act is his act. This is so true, that even the [fol. 247] agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots, employed to administer poison." *United States vs. Gooding*, 25 U. S. (12 Wheat) 460, 469.

See also 14 Am. Jur., Crim. Law, Sec. 75, Note 18, Sec. 63, Note 17; 22 C. J. S. Criminal Law, Sec. 84(b).[2]

The judgment was right and it is

Affirmed.

HUTCHESON, Chief Judge, concurring in part and dissenting in part:

I concur in the affirmance of the judgment and sentence as to both defendants on count one, the mail fraud count

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[2] The word "principal" in crime is derived from the common law, and the court may look to history and to the common law for its meaning. Morissette vs. United States, 342 U. S. 246; Williams vs. United States, 179 F. 2d 644, 647, affirmed 341 U. S. 70; Key Numbered Federal Digest, Criminal Law, Sec. 11.

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of the indictment, and as to Pereira on count ten, the transportation count.

I dissent from the affirmance of the judgment as to Brading on count ten because proof that he either transported or caused to be transported the check in question is, in my opinion wholly lacking.

Finally, I dissent as to both defendants from the conviction and sentence on count eleven, the conspiracy count. I am in no doubt that as a general rule a conspiracy count and a substantive count cannot be said to charge the same offense so that one excludes the other. I am equally in no doubt, however, that where, as here, the indictment merely charges that the conspiracy was to commit the same of- [fol. 248] fenses charged in the substantive counts, a conviction on two of those counts and a dismissal of all the others, followed by a conviction and cumulative sentence on the conspiracy count, is to run a good principle into the ground, and make double jeopardy of the conspiracy count and the sentence on it.

I dissent from the conviction on this count further on the ground fully discussed in *United States v. Crimmins*, 123 F. (2) 271, that it does not follow, because a jury might have found the defendants guilty of the substantive offense, that they were justified in finding them guilty of a conspiracy to commit it.

In this case, while it was not necessary to prove, under the substantive offenses, that the parties agreed in advance to use the mails and transport stolen securities, it was necessary in proving the conspiracy count to prove that they did so agree.

While, therefore, in this case, I think the evidence is sufficient as to both defendants to show a violation of substantive count one and the use of the mails in carrying out the scheme, I do not believe that the evidence is sufficient to show that the parties entered into a conspiracy, that is agreed to use the mails under the first count or transport securities under the tenth.

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[Vol. 249] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13980

VICTOR EMANUEL PEREIRA and EUGENE H. BRADING,

versus

UNITED STATES OF AMERICA

JUDGMENT—March 11, 1953

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Hutcheson, Chief Judge, concurs in part and dissents in part."

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[fol. 257] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—April 3, 1953

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Hutcheson, Chief Judge, concurs in part and dissents in part."

[fol. 258] Clerk's Certificate to foregoing transcript omitted in printing.

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'ols. 301-303] IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 50

VICTOR EMANUEL PEREIRA AND EUGENE H. BRADING, Petitioners

v.

UNITED STATES OF AMERICA

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STIPULATION—Filed July 2, 1953

It is hereby stipulated and agreed by and between counsel r the respective parties to the above-entitled cause that re-printing the record for the purposes of the writ of rtiorari granted on June 15, 1953, pages 1-41, inclusive, the printed record filed with the petition for a writ of rtiorari may be omitted.

It is further stipulated and agreed that the parties may fer in their briefs and arguments to the portions of the cord omitted in re-printing.

Charles L. Sylvester, Counsel for Petitioners; Oscar H. Davis, Acting Solicitor General, Counsel for respondent.

Dated: June 30, 1953.

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[fol. 304] [File endorsement omitted]

[fol. 305] SUPREME COURT OF THE UNITED STATES

No. 764, October Term, 1952

VICTOR EMANUEL PEREIRA AND EUGENE H. BRADING, Petitioners,

v.

THE UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed June 15, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9974)

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Office - Supreme Court, U. S.
FILED
APR 30 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. ~~764~~ 50

VICTOR EMANUEL PEREIRA and
EUGENE H. BRADING,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CHARLES L. SYLVESTER,
WILLIAM H. FRYER,
SIDNEY G. KINGSLEY,
Counsel for Petitioners.

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ARGUMENT:

POINT I.—Under Rule 26 of the Rules of Criminal Procedure and the decisions of this Court, the wife of a defendant in a criminal case may not testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals. The matrimonial privilege against disclosure of confidential communications may not be rejected on the ground that the marriage is "sham" when the marriage was valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited but held themselves out as man and wife 15

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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. .....

VICTOR EMANUEL PEREIRA and EUGENE H. BRADING,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

PETITION.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Victor Emanuel Pereira and Eugene H. Brading, the petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 11, 1953 which (Hutcheson, C. J. dissenting in part) affirmed a judgment of the United States District Court for the Western District of Texas, El Paso Division, convicting the petitioners on three counts of an indictment. The indictment originally included eleven counts, eight of which were dismissed on the Government's motion (R. 209-210).

The petitioners were convicted under the first count of a charge of mail fraud (62 Stat. 763, 18 U. S. C. 1341); under the tenth count of a charge of violating the National

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Stolen Property Act (62 Stat. 806, 8 U. S. C., 2314); and under the eleventh count of a charge of conspiracy to commit the acts alleged in the first ten counts, including the eight which had been dismissed on the Government's motion (62 Stat. 701, 18 U. S. C. 371).

The single incident which is the asserted basis of Federal jurisdiction is the alleged mailing by the State National Bank of El Paso, Texas, to the Citizens National Trust & Savings Bank of Los Angeles, California, of a check drawn on the Citizens Bank by Fewel & Company to the order of Gertrude J. Joyce (who was at that time the wife of the petitioner Pereira).

Although the fraud which was the subject of the indictment was an ordinary scheme to obtain money by false pretenses, the single mailing which was an adventitious consequence of the scheme and which was the basis of the conviction of the defendants has been punished by a maximum sentence of five years on the mail fraud count, a concurrent maximum sentence of ten years on the stolen property count, and a cumulative sentence of two years on the conspiracy count (R. 261).

A petition for rehearing was filed by the petitioners in the Court of Appeals on March 26, 1953 and was denied without opinion on April 3, 1953 (Hutcheson, C. J., concurring in part and dissenting in part) (R. 292-297, 299).

Jurisdictional Statement.

The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. 1254(1).

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Questions Presented.

1. May the wife of a defendant in a criminal case testify, over his objection, to confidential communications made by him during the marriage, when the case involves no injury to her person or morals?

2. May the matrimonial privilege against disclosure of confidential communications be rejected on the ground that the marriage is "sham," and such communications be disclosed, in a case where the marriage was valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties cohabited as man and wife and so held themselves out to the world?

3. When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which charges a scheme which amounts to a conspiracy, does conviction of the conspiracy count, followed by a cumulative sentence on that count, amount to double jeopardy?

4. May there be conviction of conspiracy to use the mails to defraud and to transport stolen property across State lines in the absence of evidence of any agreement to do so?

5. Are the boundaries of Federal criminal jurisdiction to be extended into the proper domain of local law enforcement authorities in order to deal with transactions amounting to ordinary larceny by fraud, through interpretation of the mail fraud and stolen property statutes, where the jurisdictional facts, the use of the mails and the transportation in interstate commerce, are not proved?

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Summary Statement of the Matter Involved.

The Government's case rested largely on the testimony of Gertrude J. Joyce, who, during the greater part of the period to which the indictment refers, including the times of the material misrepresentations, of the mailing, and of the consummation of the fraud, was the wife of the petitioner Pereira.

She testified that, in the company of her half sister, she casually met the two petitioners in El Paso, Texas (R. 64-65). Within two days she had invited the petitioners to become house guests at her home in Roswell, New Mexico (R. 67). The petitioners did so (R. 67). At Roswell, the petitioner Pereira received a telegram saying that his divorce would soon be granted and that he would soon receive his share of a property settlement (R. 68).

She and Pereira returned to El Paso several days later (R. 71). There were more parties in Juarez and in Roswell, including a birthday party for Pereira (R. 71).

Mrs. Joyce and Pereira took a trip to Wichita Falls (R. 72), where they spent several days (R. 79). Brading joined them there, and all three then drove to Dallas (R. 79). There they attended various parties (R. 114-115).

Mrs. Joyce and Pereira then went to Hot Springs for several days, and on to Kansas City (R. 83). The events at Kansas City were evidence of an extended course of immoderate drinking (R. 106-107).

Mrs. Joyce and Pereira were married in Kansas City on May 25, 1951 (R. 61).

Mrs. Joyce (who was now Mrs. Pereira) gave her husband funds with which he bought a Cadillac (R. 85). At Greenville they looked at the Washington Hotel; they then drove on to Dallas, where they had a private dis-

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cussion about that hotel (R. 90). Pereira told his wife that he had an option on the hotel through an agent named Wilson (R. 90).

She proposed that she have Fewel & Company, her brokers in Los Angeles, sell some securities so that she could go into the hotel deal with him (R. 90).

On June 2, 1951, Mr. and Mrs. Pereira returned to Roswell (R. 92). On June 11, 1951, Pereira told his wife that he had called Wilson's office (R. 92). He later received a telegram signed in the name of Wilson, purporting to extend the option (R. 93).

Mrs. Pereira received a check of Fewel & Company for $35,286.78 drawn on the Citizens National Trust & Savings Bank of Los Angeles, as the proceeds of the sale of certain securities (R. 93, 95). She and Pereira went to El Paso; she endorsed the check to him; and he there deposited it with the State National Bank for collection (R. 94).

Kathryn Joyner, the half sister of Mrs. Pereira, corroborated her testimony as to the circumstances under which they first met the petitioners (R. 140). She testified that Mrs. Pereira never said anything to her about these financial transactions (R. 143).

The clerks of the Denver courts testified that there was no divorce case to which Pereira was a party (R. 144, 160). The lessee of the Washington Hotel and a representative of the owner denied knowledge of any option to Pereira, but the lessee testified that there had been a considerable amount of activity by interested persons looking generally toward the purchase of the fee ownership as well as the lease (R. 149, 161-167).

There was no direct testimony as to the transmission of the check of Fewel & Company to California by mail. An officer of the State National Bank testified that, according to the bank's records, it was entered for collection

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and sent by mail to the Citizens National Bank with instructions to "wire fate" (R. 190-191); that wire advice of payment was later received; and that payment was made (R. 192). A clerk of the bank testified as to the deposit of the check by Pereira and later payment to him (R. 200-202).

After dismissal of eight counts charging mail fraud, the jury convicted the petitioners of the charge of mail fraud under the first count, of transporting stolen property under the tenth count, and conspiracy under the eleventh count (R. 259). The sentence of the Court was the maximum confinement under Count One, five years; the maximum confinement under Count Ten, ten years, to run concurrently; and a cumulative sentence of two years under Count Eleven (R. 261).

The Court of Appeals affirmed the judgment, Hutcheson, C. J., dissenting in part. In the portions of the opinion involved in this petition, the Court held that the testimony of Mrs. Pereira (now once more Mrs. Joyce) was in general admissible against her husband by reason of the divorce prior to the trial. It held, moreover, that the petitioner Pereira could not assert his privilege against the disclosure of confidential matrimonial communications made to his wife during the marriage, because as far as he was concerned the marriage was a mere "sham and pretense". The Court held that when the check of $35,286.78 received by Mrs. Pereira from her brokers and endorsed by her to him was mailed for collection by the El Paso bank to the Los Angeles bank on which it had been drawn, that mailing constituted the mailing referred to in the first count, the interstate transportation of a security obtained by fraud as charged in the tenth count, and the culmination of the conspiracy charged in the eleventh (R. 279-289).

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Hutcheson, C. J., concurred in the affirmance as to both petitioners on Count One, the mail fraud count, and as to Pereira on Count Ten, the transportation count. He dissented as to Brading on Count Ten because proof that Brading caused the transportation was wholly lacking. He also dissented as to both petitioners on Count Eleven, the conspiracy count, on the ground that conviction as to that count and the cumulative sentence amounted to double jeopardy; and on the further ground that, as discussed in *United States* v. *Crimmins*, 123 F. 2d 271 (C. C. A. 2d), the fact that a jury might have found the petitioners guilty of the substantive offense did not authorize a conviction of the conspiracy. (R. 289-290)

Statutes Involved.

62 Stat. 763, 18 U. S. C. 1341 (Mail Fraud):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

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62 Stat. 806, 18 U. S. C. 2314 (National Stolen Property Act):

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . .

62 Stat. 701, 18 U. S. C. 371 (Conspiracy):

If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Reasons for Granting the Petition.

1. In holding that the wife of a defendant in a criminal case may, over his objection, testify as to confidential communications made to her by him, the Court of Appeals has decided a question of Federal law, arising under Rule 26 of the Federal Rules of Criminal Procedure, in conflict with applicable decisions of this Court in *Bassett* v. *United States,* 137 U. S. 496, and *Blau* v. *United States,* 340 U. S. 332.

2. The Court of Appeals has decided important questions of Federal law which have not been, but should be, decided by this Court, as follows:

a. Under Rule 26 of the Federal Rules of Criminal Procedure, and *Lutwak* v. *United States,* 344 U. S. 604, is a marriage "sham" so as to avoid a defendant's

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privilege against the disclosure of confidential communications made to his wife, in a criminal case involving no offense against her person or morals, when they were married without express or implied reservation, and have consummated the marriage, cohabited as man and wife, and held themselves out as married?

b. When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a conspiracy, does conviction on the conspiracy count, followed by a cumulative sentence on that count, amount to double jeopardy?

c. May a defendant properly be convicted of the substantive offense of transporting stolen property although there is no proof that he transported or caused to be transported the property in question across state lines, or knowingly assisted in the transportation?

3. The decision of the Court of Appeals is in conflict with the following decisions of other circuits:

a. With *United States* v. *Walker,* 176 F. 2d 564 (C. A. 2d), in holding confidential communications made by a defendant to his wife to be admissible against him;

b. With *United States* v. *Crimmins,* 123 F. 2d 271 (C. C. A. 2d), in holding that a charge of a conspiracy to commit a large number of substantive offenses may be sustained although most of the substantive counts have been dismissed and are unsupported by proof.

4. This Court should exercise its power of supervision to correct a departure from the usual course of procedure in unwarrantably extending Federal criminal jurisdiction into a field which is the proper realm of local law enforce-

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ment authorities, since the mailing which is the jurisdictional fact was not proved.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Fifth Circuit, commanding said Court of Appeals to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case numbered and entitled on its docket, No. 13980, Victor Emanuel Pereira and Eugene H. Brading, Appellants, versus United States of America, Appellee, to the end that this cause may be reviewed and decided by this Court as provided by the statutes of the United States; and that the judgment herein of said Court of Appeals be reviewed by this Court, and that this Court grant such other and further relief as may be proper.

Dated, April 30, 1953.

CHARLES L. SYLVESTER,
WILLIAM H. FRYER,
SIDNEY G. KINGSLEY,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. .....

VICTOR EMANUEL PEREIRA and EUGENE H. BRADING,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

There was no opinion in the District Court. The majority opinion in the Court of Appeals and the dissenting opinion of Hutcheson, C. J., are not yet reported, but are in the record at pages 279-290.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is March 11, 1953. The date of the denial of the petition for rehearing is April 3, 1953.

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2. The statutory provision which is believed to sustain the jurisdiction of this Court is 62 Stat. 928, 28 U. S. C. 1254(1).

III.

Statement of the Case.

The case has already been stated in the preceding petition for review by certiorari (at pages 4 to 7), which is respectfully adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Court of Appeals erred in holding that the wife of a defendant in a criminal case may testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals.

2. The Court erred also in holding that the matrimonial privilege against disclosure of confidential communications may be rejected on the ground that the marriage is "sham", and such communications disclosed, in a case where the marriage was undoubtedly valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited as man and wife but so held themselves out to the world.

3. The Court erred, further, in holding that when an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each

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of which itself charges a scheme which amounts to a conspiracy, conviction of the conspiracy count followed by a cumulative sentence on that count does not amount to double jeopardy.

4. The Court erred in holding that there may be a conviction of conspiracy to use the mails to defraud and to transport stolen property across State lines in the absence of evidence of any agreement to do so.

5. The Court erred in holding that the boundaries of Federal criminal jurisdiction may be extended into the proper domain of local law enforcement authorities in order to deal with transactions amounting to ordinary larceny by fraud, through interpretation of the mail fraud and stolen property statutes, where the jurisdictional facts, the use of the mails and the transportation in interstate commerce, are not proved.

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ARGUMENT.

Summary of the Argument.

Point I. Under Rule 26 of the Rules of Criminal Procedure and the decisions of this Court, the wife of a defendant in a criminal case may not testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals. The matrimonial privilege against disclosure of confidential communications may not be rejected on the ground that the marriage is "sham" when the marriage was valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited but held themselves out as man and wife.

Point II. When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a conspiracy, conviction on the conspiracy count, followed by a cumulative sentence, amounts to double jeopardy.

Point III. In the absence of evidence of any agreement to use the mails to defraud or to transport stolen property across State lines, a count charging conspiracy to commit those offenses must fall.

Point IV. The conviction of the petitioners of the substantive offenses of using the mails to defraud and of transporting stolen property was unsupported by proof of the crucial fact of the mailing, and represents an unwarranted extension of Federal criminal jurisdiction into the proper domain of local law enforcement authorities.

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POINT I.

Under Rule 26 of the Rules of Criminal Procedure and the decisions of this Court, the wife of a defendant in a criminal case may not testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals. The matrimonial privilege against disclosure of confidential communications may not be rejected on the ground that the marriage is "sham" when the marriage was valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited but held themselves out as man and wife.

The evidence which, in the view of the Government, shows that the delivery by Mrs. Pereira of the check of Fewel & Company to her husband was obtained by fraud, was largely her own testimony. At the time of the incidents as to which she testified, she was the wife of the petitioner Pereira. They were married on May 25, 1951 (R. 61), and the incidents as to which she testified occurred thereafter during May and June (R. 84-93). They were not divorced until November 16, 1951 (R. 61), more than a month after the date of the indictment (R. 47) and less than two months before the trial (R. 58).

Under continuing objection on the ground that her testimony related to confidential communications between husband and wife (R. 62), she testified to the following alleged conversations and events, among others:

She sold some securities in California and obtained from her brokers, Fewel & Company, a check for $6,956.55 (R. 84, Gov. Ex. G-3). She gave her husband this check when

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a Cadillac automobile which he was purchasing was ready for delivery (R. 85). He stated that the car would cost $4,750 (R. 85). She told him that she wanted the rest of the money returned to her, and he replied that they would settle all that later (R. 85). He kept the money and did not return it to her (R. 84).

Over the same objection, which was explicitly reiterated (R. 89), she was permitted to relate the following conversation: Pereira said that if she wanted to go in with him on the investment, he could buy the Washington Hotel for $75,000 (R. 89-90). She told him that she had some securities she could sell, on which she was not making a large return (R. 90). She said that she knew that he was capable and she trusted him; and she offered to sell the securities (R. 90). When she was unable to reach her brokers by telephone, he suggested that she telephone them when they returned home (R. 90). He said that he had a broker named E. J. Wilson in Fort Worth, whom he was going to see about this deal, and that he had not really made up his mind about it until she said she would put up the money (R. 90). When Pereira returned after an absence he reported that they had obtained the hotel "for a song"; that there was an old man running it for years who wanted to get rid of it; that is was a wonderful deal, and that he had an option on it (R. 90).

Under the same objection, she was permitted to testify that her husband went to Fort Worth to see about the hotel, told her he had obtained an option on it and that he had paid $2,500 down, and produced a purported option (R. 91-92). He told her that he had telephoned his lawyer and obtained $2,500, which he had used to make the down payment (R. 92). About June 15, her husband told her that he had obtained an extension of the option (R. 93). When

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the check from Fewel & Company arrived, they discussed their affairs and decided that they would bank the money in El Paso because she didn't want everybody in Roswell, her home town, to know about the deal (R. 93). Pereira told her that he was going to El Paso to sign some papers in liquidation of his prior divorce, and for which money was waiting for him in El Paso (R. 94). He later told her that he had done so (R. 94). That evening, June 18, 1951, Pereira told her that he was going to leave early next morning and be back early that afternoon, and that he would pay her what he owed her the next day (R. 98).

Rule 26 of the Federal Rules of Criminal Procedure provides in part:

> "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."

We assume for the purposes of this petition that the divorce, although it occurred after the date of the indictment and shortly before the trial, rendered academic the question whether Mrs. Pereira could testify against her former husband. 8 WIGMORE, EVIDENCE, Sec. 2237. But the husband's privilege against disclosure of confidential communications by him to his wife, which is the privilege here asserted by Pereira, is quite distinct from the general privilege excluding the testimony of one spouse against the other. *Wolfle* v. *United States,* 291 U. S. 7, 13-14. It is settled that the special marital privilege against the disclosure of confidential communications, as distinguished from the general privilege prohibiting testimony by one spouse against another, survives a divorce.

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8 WIGMORE, EVIDENCE, Sec. 2341(2);
United States v. *Mitchell*, 137 F. 2d 1006 (C. C. A. 2d);
United States v. *Walker*, 176 F. 2d 564 (C. A. 2d).

In *Bassett* v. *United States*, 137 U. S. 496, in reversing a conviction for polygamy on the ground that the testimony of the lawful wife as to disclosures by her husband of his second marriage was improperly permitted, this Court sustained the following single assignment of error (see 137 U. S. at 497):

> "The District Court erred in permitting Mrs. Sarah Bassett, the former legal [i. e. the first] wife of the plaintiff in error, against his objection, to testify to a confidential communication made to her by him, while they were husband and wife, and not in the presence of any other person."

Brewer, J., speaking for the Court (at 505) quoted from *Stein* v. *Bowman*, 13 Pet. 209, 222, in which Mr. Justice McLean said:

> "It is, however, admitted in all the cases that the wife is not competent, except in cases of violence upon her person, directly to incriminate her husband, *or to disclose that which she has learned from him in their confidential intercourse.*" (Italics supplied.)

Bassett v. *United States* was decided under statutes which were, like Rule 26, declaratory of the common law. (See 137 U. S. at 504; 2 WIGMORE, EVIDENCE, Sec. 488, p. 574; *Overton* v. *State*, 43 Tex. 616, 618-9). The opinion of this Court in the *Bassett* case was clearly based upon the common law privilege against the disclosure of confidential marital communications. As recently as *Blau* v. *United*

States, 340 U. S. 332, 333-334, the Court reaffirmed that it had "no doubt" as to the privilege.

See also *United States* v. *Walker,* 176 F. 2d 564, 567 (C. A. 2d).

Assuming that the privilege against the disclosure of confidential marital communications is limited, like the privilege against anti-marital testimony, to exclude cases where the alleged injury is to the wife's person or her morals (8 WIGMORE, EVIDENCE, Sec. 2338), this is clearly not such a case as falls within the exception. It does not involve any offense against her person, or subjection of her to any moral degradation such as appears in the Mann Act cases. See *Shores* v. *United States,* 174 F. 2d 838 (C. A. 10th); *United States* v. *Mitchell,* 137 F. 2d 1006 (C. C. A. 2d).

The observation in *Blau* v. *United States,* 340 U. S. 332, 333, that marital communications are "presumptively confidential" means simply that they are deemed to be confidential unless the contrary is proved. 8 WIGMORE, EVIDENCE, Sec. 2336, cited at 340 U. S. 332, 333. These conversations and communications occurred between husband and wife in private, and neither in the presence of nor through any other person. There is no evidence that they were intended for transmission to others, or that they were not intended to be confidential; indeed, the reverse is the case. That all of these conferences and communications were in fact confidential is shown by the fact that Mrs. Pereira disclosed nothing of them to her sister (R. 143) and asked that Pereira refrain from discussing them with Brading (R. 133).

The Court of Appeals recognized that the communications and conversations which are the basis of the Government's case were confidential and privileged, saying:

> ". . . Her competency to testify to any communications between husband and wife which were confidential and privileged remained unaffected by the divorce. [Citing authorities]" (R. 284).

The Court held, however, that "insofar as the defendant Pereira was concerned" the marriage relation was merely a sham used as a means to perpetrate a fraud, and that the privilege against disclosure of confidential communications was not available to him (R. 284).

This was error. There is no question that the marriage was valid as between the parties; indeed, the divorce was a conclusive adjudication to that effect. 2 FREEMAN, JUDGMENTS (5th ed. 1925) Sec. 906; See *Williams* v. *North Carolina,* 325 U. S. 226, 232. There was no express or implied reservation by either party. The marriage was consummated, they cohabited as man and wife, and they held themselves out to the world as married (R. 83, 87, 91, 92, 94, 100, Govt. Ex. G-5, 136, Govt. Exs. G-6, G-7, G-8, G-9, 101-106, 127).

In *Lutwak* v. *United States,* 344 U. S. 604, in which this Court held that the wives of the defendants were competent witnesses against their husbands, and by inference free from the privilege against disclosure of marital communications, the marriage ceremonies were indeed sham, being entered into under explicit agreements that the ceremonies were to be of no effect. The parties never cohabited as spouses, and never intended to do so; and the marriages were properly held to be void *ab initio* (344 U. S. at 613-615). The case at bar, however, is more than even a "limited purpose" marriage, to which this Court referred as presenting a different problem (344 U. S. at 612).

The authorities cited by the Court of Appeals (R. 284-285) as avoiding the privilege against confidential commu-

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nications in this case are not in point. Indeed, that Court has misread 8 WIGMORE, EVIDENCE, Sec. 2230, n. 3. The passage cited, referring to the privilege against anti-marital testimony, says that the benefits of the privilege

> ". . . are gained by the ingenious wrongdoer who brings himself within its formal terms by marrying the witness *after service of subpoena* and thus creating 'ad hoc' a domestic peace which is to be jealously safeguarded." (Italics in original.)

It is clear that the Court of Appeals has simply misread this passage as saying "are *not* gained", and thus innocently reversed its meaning. The actual text supports the petitioners' contentions. In the *Lutwak* case this Court recognized the validity, for the present purpose, of a marriage entered into in order to render the wife incompetent as a witness. 344 U. S. at 612.

Clark v. *U. S.*, 289 U. S. 1, 14, cited by the Court of Appeals, did not involve the marital privilege, but concerned the "inveterate but vague tradition" (289 U. S. at 13) against a juror's testifying regarding the jury's deliberations. The importance of that "privilege" cannot be compared with that of the privilege against disclosure of marital confidential communications, in weighing the social values for and against its refusal.

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POINT II.

When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a conspiracy, conviction on the conspiracy count, followed by a cumulative sentence, amounts to double jeopardy.

Hutcheson, C. J., dissented from the decision of the Court of Appeals sustaining the conviction on the eleventh count, which charged a conspiracy to commit the offenses charged in the first ten substantive counts. The second to ninth counts inclusive, which all charged a scheme to commit mail fraud, were dismissed on the Government's motion (R. 209-210). In his dissent Hutcheson, C. J., aptly said (R. 290):

> "I am in no doubt that as a general rule a conspiracy count and a substantive count cannot be said to charge the same offenses so that one excludes the other. I am equally in no doubt, however, that where, as here, the indictment merely charges that the conspiracy was to commit the same offenses charged in the substantive counts, a conviction on two of those counts and a dismissal of all the others, followed by a conviction and cumulative sentence on the conspiracy count, is to run a good principle into the ground, and make double jeopardy of the conspiracy count and the sentence on it."

This Court has recognized that the conspiracy statute is being much abused, and has been carried beyond the theory which supposes a serious and substantially continued group scheme for cooperative law breaking; and that the joinder of conspiracy and substantive counts

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especially is being used arbitrarily and harshly. *Pinkerton* v. *United States,* 328 U. S. 640, 644, n. 4.

Each of the substantive counts alleges that the two petitioners joined in a scheme to commit the acts which the conspiracy count charges them with conspiring to commit (R. 48-55). Under the terms of this indictment it is plain that, as this Court said in *Pinkerton* v. *United States,* 328 U. S. 640, 644:

> "A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy."

The scheme thus charged in the eleventh count is precisely the same as that charged in the nine substantive counts. By its terms it alleges that the petitioners (R. 52-53)

> ". . . unlawfully and knowingly conspired to commit the various offenses against the United States which are fully described and set out in the first ten counts of this indictment . . ."

As this Court held in *Braverman* v. *United States,* 317 U. S. 49, such an indictment, taken as a whole, charges only one offense and may be the basis of only one punishment:

> "Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one" (317 U. S. at 53).

See also:

Sealfon v. *United States,* 332 U. S. 575.

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POINT III.

In the absence of evidence of any agreement to use the mails to defraud or to transport stolen property across State lines, a count charging conspiracy to commit those offenses must fall.

In dissenting from the conviction of the petitioners on the eleventh count charging a conspiracy (R. 52-53) to "commit the various offenses . . . which are fully described and set out in the first ten counts," Hutcheson, C. J. said (R. 290):

> "I dissent from the conviction on this count further, on the ground fully discussed in *U. S.* v. *Crimmins,* 123 F. 2d 271, that it does not follow, because a jury might have found the defendants guilty of the substantive offense, that they were justified in finding them guilty of a conspiracy to commit it.
>
> "In this case, while it was not necessary to prove, under the substantive offenses, that the parties agreed in advance to use the mails and transported stolen securities, it was necessary in proving the conspiracy count to prove that they did so agree.
>
> "While, therefore in this case, I think the evidence is sufficient as to both defendants to show a violation of substantive count one and the use of the mails in carrying out the scheme, I do not believe that the evidence is sufficient to show that the parties entered into a conspiracy, that is agreed to use the mails under the first count or transport securities under the tenth."

There is no evidence that the petitioners agreed to use the mails to carry out a scheme to defraud, and there is no evidence that they agreed to transport stolen property across State lines. A conspiracy to use the mails to effect

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a scheme to defraud can be proved only by proof of all of the elements of that offense, including an agreement to use the mails for that purpose. *United States* v. *Cohen,* 145 F. 2d 82 (C. C. A. 2d). Similarly, a conspiracy to transport stolen property in interstate commerce requires proof that the parties agreed to transport the stolen property in interstate commerce. *United States* v. *Crimmins,* 123 F. 2d 271 (C. A. 2d); *Cf. Fulbright* v. *United States,* 91 F. 2d 210 (C. C. A. 8th).

As the Second Circuit said in *United States* v. *Crimmins,* 123 F. 2d 271, 273, per Learned Hand, J., in reversing a conviction of conspiracy to transport stolen securities:

> "But it does not follow, because a jury might have found him guilty of the substantive offense, that they were justified in finding him guilty of a conspiracy to commit it. Courts do indeed say that each conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding [citing cases]. And this is equally true, when the crime which the conspirators have agreed upon, is one of which they severally might be guilty though they were ignorant of the existence of some of its constituent facts."

As Hutcheson, C. J. pointed out (R. 290), there was no evidence that Brading agreed to transport or caused to be transported the check in question and therefore no basis for his conviction of the offense of conspiracy. *Gable* v. *United States,* 84 F. 2d 929 (C. C. A. 7th); *Langer* v. *United*

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States, 76 F. 2d 817 (C. C. A. 8th). In the absence of such an agreement by Brading, we are left with the impossible proposition that Pereira conspired with himself. There is thus no ground for the conviction on the conspiracy count of either of the petitioners.

POINT IV.

The conviction of the petitioners of the substantive offenses of using the mails to defraud and of transporting stolen property was unsupported by proof of the crucial fact of the mailing, and represents an unwarranted extension of Federal criminal jurisdiction into the proper domain of local law enforcement authorities.

It is well established that the jurisdictional fact of the mailing is the gist of the offense of using the mails to defraud, and must be proved by competent evidence in order to sustain a substantive count charging that offense. *Rosenberg* v. *United States,* 120 F. 2d 935 (C. C. A. 10th); *Whealton* v. *United States,* 113 F. 2d 710 (C. C. A. 3d); *United States* v. *Baker,* 50 F. 2d 122 (C. C. A. 2d).

The mailing may of course be proved in appropriate fashion by circumstantial evidence or by reference to an established customary practice. *Decker* v. *United States,* 140 F. 2d 378 (C. A. 4th). The same considerations necessarily apply to a substantive charge of transporting stolen property by means of the mails; the interstate transportation is the gist of the offense. *United States* v. *Handler,* 142 F. 2d 351 (C. C. A. 2d); *United States* v. *Sheridan,* 329 U. S. 379, 386-390.

The evidence in support of the mailing was the testimony of an officer of the State National Bank, with which Pereira deposited the check for collection (R. 186-193).

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The witness had no personal knowledge of the transaction (R. 192-193). His testimony that the mailing occurred was merely an interpretation of an unidentified record which was not introduced in evidence (R. 190-191). The alleged letter of transmittal was not in evidence (R. 192), nor was there any evidence of any customary practice of mailing to support the bank's record in order to establish a basis for its admission if it had been offered.

This evidence was insufficient to prove that the mails were used. *Mackett* v. *United States,* 90 F. 2d 462 (C. A. 7th); *United States* v. *Baker,* 50 F. 2d 122 (C. C. A. 2d). The question was appropriately reserved by the petitioners' motion for acquittal for failure of proof (R. 217-218, Pars. I, III, VI).

This Court's supervisory power should be exercised in order to correct this unwarranted extension of Federal criminal jurisdiction into a field which is the proper realm of local enforcement authorities. Federal criminal jurisdiction itself depends, in this case, on the fact of the mailing; and that jurisdictional fact was not proved.

Conclusion.

It is respectfully submitted that, for the reasons stated, this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Dated, April 30, 1953.

Respectfully submitted,

CHARLES L. SYLVESTER,
WILLIAM H. FRYER,
SIDNEY G. KINGSLEY,
Counsel for Petitioners.

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FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. ~~764~~ 50

VICTOR EMANUEL PEREIRA and EUGENE H. BRADING,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONERS.

CHARLES L. SYLVESTER,
WILLIAM H. FRYER,
SIDNEY G. KINGSLEY,
Counsel for Petitioners.

Pandick Press, Inc., 22 Thomas St., New York 6, N. Y., U. S. A.

IN THE

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OCTOBER TERM 1952.

No. 764.

VICTOR EMANUEL PEREIRA and EUGENE H. BRADING,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS.

This reply brief is submitted for the sole purpose of calling to the Court's attention an erroneous statement in the brief for the United States in opposition to the petition for a writ of certiorari.

At page 9 of the brief of the United States, it is stated, citing R. 202-203, that a clerk in the State National Bank at El Paso testified "that he had forwarded the check to Los Angeles for collection . . ." The same error is repeated at page 16 of the brief of the United States, where it is said, referring to R. 202, that the clerk testified "that he personally had sent it to Los Angeles for collection."

When the cited pages of the record are read with care, it will be seen that there is no such testimony.

Dated, June 3, 1953.

Respectfully submitted,

CHARLES L. SYLVESTER,
WILLIAM H. FRYER,
SIDNEY G. KINGSLEY,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 50.

VICTOR EMANUEL PEREIRA and
EUGENE H. BRADING,
Petitioners,

against

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONERS.

CHARLES L. SYLVESTER,
WILLIAM H. FRYER,
SIDNEY G. KINGSLEY,
Counsel for Petitioners.

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VICTOR EMANUEL PEREIRA and EUGENE H. BRADING,
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against

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONERS' BRIEF.

Opinions of Courts Below.

There was no opinion in the United States District Court for the Western District of Texas, El Paso Division.

The majority opinion of Rives, C. J., in the Court of Appeals for the Fifth Circuit is reported in *Pereira* v. *United States*, 202 F. 2d 830, and appears at pages 148-158 of the record.

The dissenting opinion of Hutcheson, Ch. J., is reported at 202 F. 2d 837 and appears at pages 158-159 of the record.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. 1254(1).

Certiorari was granted by this Court on June 15, 1953 (R. 164).

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Statement of the Case.

This Court has granted certiorari (R. 164) to review a judgment of the United States Court of Appeals for the Fifth Circuit (R. 160) which (Hutcheson, Ch. J., dissenting in part) affirmed a judgment of the United States District Court for the Western District of Texas, El Paso Division (R. 141) convicting the petitioners on three counts of an indictment (R. 141).

The indictment originally included eleven counts, eight of which were dismissed at the close of the trial on the Government's motion (R. 1-8, 109).

The petitioners were convicted under the first count (R. 1-2) of a charge of mail fraud (62 Stat. 763, 18 U. S. C. 1341); under the tenth count (R. 5-6) of a charge of violating the National Stolen Property Act (62 Stat. 806, 18 U. S. C. 2314); and under the eleventh count (R. 6) of a charge of conspiracy to commit the acts alleged in the first ten counts, including the eight which had been dismissed on the Government's motion (62 Stat. 701, 18 U. S. C. 371).

The First Count alleges that Brading and Pereira, the petitioners, "devised and intended to devise a scheme and artifice to defraud Mrs. Gertrude J. Joyce" by falsely representing that Pereira was obtaining a divorce in Denver, Colorado and was to receive $48,000 as a settlement; that he was a wealthy businessman; that he was a hotel man of wide experience and had an option to buy a certain hotel in Greenville, Texas; that it was a fine financial proposition and would earn a fine living for Mrs. Joyce and him; that he needed immediate cash for this purpose (R. 1); that Brading was a wealthy oil man and was to close an oil lease; that if Mrs. Joyce would lend Pereira $5,000 he would double his money; and that Pereira was

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violently in love with Mrs. Joyce (R. 2). It is alleged that Mrs. Joyce advanced $35,286.78 to Pereira and lent the defendants $5,000, and that she was induced to marry Pereira (R. 2). This count alleges that on June 15, 1951, for the purpose of executing the scheme, Pereira and Brading

> "caused to be placed in an authorized depository for mail matter a letter addressed to the Citizens National Trust & Savings Bank, Los Angeles, California, to be sent and delivered by the Post Office establishment of the United States" (R. 2).

The Tenth Count alleges that on the same date Pereira and Brading, with unlawful and fraudulent intent, caused to be transported in interstate commerce from El Paso to Los Angeles a check drawn by Fewel & Company on Citizens National Trust & Savings Bank payable to Mrs. Joyce in the amount of $35,286.78 (R. 5-6).

The Eleventh Count alleges that, commencing on or about April 19, 1951, Pereira and Brading conspired to commit the offenses set out in the first ten counts of the indictment (including the eight counts dismissed on the Government's motion at the close of the trial (R. 109)) and that pursuant to that conspiracy they performed each of the overt acts alleged in the preceding ten counts (including those dismissed); had a conversation with Mrs. Joyce and Kathryn Joyner in the Del Norte Hotel at El Paso; opened an account at the State National Bank in that city in the name of Pereira; and on June 15, 1951 caused Mrs. Joyce to endorse a check at the Del Norte Hotel (R. 6).

The single incident which is the asserted basis of Federal jurisdiction is the alleged mailing for collection by the State National Bank of El Paso, Texas, to the Citizens National Trust & Savings Bank of Los Angeles, California,

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of a check drawn on the Citizens Bank by Fewel & Company to the order of Gertrude J. Joyce (who was at that time the wife of the petitioner Pereira).

Although the fraud charged by the indictment was an ordinary scheme to obtain money by false pretenses, the single alleged mailing which was an adventitious consequence of the scheme and which was the basis of the conviction of the defendants has been punished by a maximum sentence, as to each of the petitioners, of five years on the mail fraud count, a concurrent maximum sentence of ten years on the stolen property count, and a cumulative sentence of two years on the conspiracy count (R. 143-144).

Testimony of Mrs. Joyce (Gertrude Joyce Pereira).

The Government's case rested largely—and its essential elements entirely—on the testimony of Gertrude J. Joyce who, during the greater part of the period to which the indictment refers, including the times of the principal material misrepresentations, of the mailing and of the consummation of the fraud, was the wife of the petitioner Pereira. She was by her own account fifty-five years old—at least ten years older than Pereira (R. 46)—and had been married twice before (R. 11, 53, 55). She was a woman of substantial means, and had various business and property interests (R. 55-56).

She testified that she and her half-sister, Kathryn Joyner, casually met the appellant Brading, known to them as Lee, on the steps of the Del Norte Hotel in El Paso, Texas (R. 11-12). Brading took them into the cocktail lounge of the hotel and introduced them to Pereira (R. 12). The four visited Juarez that evening and the next, having dinner and attending various night clubs (R. 13, 14). Pereira was already making love to Mrs. Joyce (R. 14).

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Within two days from the time when they first met, and at her suggestion (R. 42-43), she had invited Pereira and Brading to become house guests at her home in Roswell, New Mexico (R. 14). They accepted the invitation (R. 14).

Pereira told her that he was a hotel man from Denver, that he was getting a divorce there, and that he had given some hotels to his wife Ada as part of the divorce settlement (R. 50, 51). At Roswell, he received a telegram saying that his divorce would soon be granted and that he would soon receive $48,000 as his share of a property settlement (R. 15, 17).

Pereira and Brading had been talking about the oil business, and saying that when Pereira received his money he would go into that business with Brading (R. 15). Brading later told her that there were some leases on which they could double their money, but that Pereira would have to pass up the opportunity because his funds would not be available for a month (R. 15, 16). Pereira was not present (R. 16). Brading said that he himself was investing $2,000, and asked her to let Pereira have $5,000 (R. 16). She accordingly wrote out a check for $5,000 (R. 16).

She and Pereira visted El Paso several days later, staying there several days (R. 17). Pereira told her that Brading was going to meet him there to sign some leases (R. 17).

They visited Juarez again that night, drove back to Roswell and "had a good, gay time" (R. 17). She invited some friends to a birthday party in Pereira's honor (R. 17).

A few days later, at Pereira's suggestion that they "take a little trip together and become better acquainted," and at her expense, he and Mrs. Joyce took a trip to Wichita Falls, where they spent several days (R. 17-19). A letter she then wrote to Miss Joyner boasts of "loads of fun" and a severe hangover (G-2, R. 19-20). Brading joined them

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there for the weekend, and all three then drove to Dallas (R. 20) where they sojourned a few more days (R. 43-46). There they attended various parties in the company of a lady known as Red Snapper, "an old, old friend" of Mrs. Joyce (R. 57), and who completed the foursome (R. 58).

At all of these occasions Pereira and Mrs. Joyce stayed at hotels where, as the majority opinion in the Court of Appeals aptly put it, they observed the proprieties of registering in their own names for separate rooms (R. 44-45, 47, 151).

Pereira and Mrs. Joyce then went to Hot Springs for a few days, and there decided to get married in Kansas City (R. 23, 24). They proceeded to Kansas City, where their conduct was such as to give evidence of an extended course of immoderate drinking and to leave small doubt of the degree of their intimacy (R. 46-49).

Pereira had expressed the expectation of being able to buy a Cadillac (R. 22-23). Mrs. Joyce volunteered to lend him the money (R. 23-24).

Mrs. Joyce and Pereira were married in Kansas City on May 25, 1951 at a wedding attended by all of her friends in Kansas City and by Brading and Kathryn Joyner, who flew up for the ceremony (R. 25). All of them attended a cocktail party the next day at the home of her friends, who were "very prominent people in Kansas City" (R. 25). Shortly after the marriage she advanced the funds with which he purchased the Cadillac (R. 25-26).

Pereira told his wife, in Brading's presence, that he had telephoned Greenville, Texas and found out that he could buy a hotel there (R. 27-28). He suggested that they drive by Greenville and see it (R. 28). They visited the Washington Hotel at Greenville, and looked at it (R. 28, 29). Pereira and Brading discussed the question whether it would be advisable for Pereira to buy it, Brading saying

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that he did not know anything about the hotel business (R. 28).

In Dallas, Pereira had a private discussion with his wife about the hotel in Greenville (R. 29). He suggested that she go in with him on the investment, and said that he thought he could buy the hotel for $78,000 (R. 29). She offered to sell some securities for that purpose (R. 29). He said that he had a broker named E. J. Wilson whom he was going to see about the deal (R. 29). He went out and was gone all day, and returned saying that he had an option on the hotel (R. 29). The option was not offered or received in evidence, but she was permitted to testify as to its contents (R. 30).

On June 2, 1951, Mr. and Mrs. Pereira returned to Roswell and there attended a party or ball, because she "wanted everyone to meet" him (R. 30). On June 11th, he told her that he had called Wilson's office about an extension of the option (R. 31), and later told her that he had received a telegram signed in the name of Wilson extending the option (R. 31).

Mrs. Pereira, after directing the sale of certain securities, received as the proceeds of the sale a check of Fewel & Company, her brokers, for $35,286.78, drawn on the Citizens National Trust & Savings Bank of Los Angeles (R. 31, G-4, R. 33). She and Pereira went to El Paso to deposit the money because he had an account at the State National Bank there, and because she

> "... decided I did not want everybody in Roswell to know about this deal" (R. 31).

A few days later Pereira told her that Brading wanted him to drive to a little town in Texas to pick up some oil leases (R. 34). On the morning of June 15, 1951 Brading and Pereira departed (R. 34-35), and she did not see them again until the trial (R. 36).

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She was divorced from Pereira on June 16, 1951 (R. 10), more than a month after the date of the indictment (R. 1) and less than two months before the trial (R. 8).

Other Testimony.

Miss Kathryn Joyner corroborated her half-sister's testimony as to the circumstances under which they first met Brading and then Pereira (R. 62-65). For the rest, she merely testified that Pereira had mentioned receiving a telegram about his divorce and a $48,000 settlement, that the four had stopped at Greenville on the way from Kansas City to Dallas after the wedding, and that Pereira had said he had looked at the hotel to lease (R. 64-65). She testified that Mrs. Pereira never said anything to her about these financial transactions with her husband (R. 65).

The Clerks of the Denver courts having divorce jurisdiction testified that there was no divorce case there in 1951 or during several preceding years to which Pereira was a party (R. 65-66, 75-76).

The lessee of the Washington Hotel at Greenville and a representative of the owner of the hotel denied knowledge of any option to Pereira, but the lessee testified that there had been a considerable amount of activity by interested persons looking generally toward the purchase of the fee ownership as well as the lease (R. 69-70, 77-81). The hotel had been listed for sale (R. 80). The lessee also testified that he had discussed with a broker the possibility of a transfer of the lease (R. 78-80, 81-82), and that although he was approached about the possibility of selling the lease he could not do so without the consent of the owners (R. 78-79) and of his partner (R. 81).

A friend of Mrs. Joyce residing at Ruidosa, New Mexico (R. 84) testified that Mr. and Mrs. Pereira were her guests at a dinner party in June; and that Pereira expressed love

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for his wife, stated that he had owned several second rate hotels, and said that he had to fly back to Greenville to take up an option on a hotel there (R. 84-86). Brading was not present at this time (R. 87).

There was evidence that a telegram was sent from Fort Worth to Pereira in Roswell on June 13th (G-12, R. 83) purporting to authorize a seven-day extension of an option by E. J. Wilson (R. 82). The proprietor of a telephone answering service in Fort Worth testified that Brading was a customer of his service at this time, and was known to him as E. J. Wilson (R. 107-108).

There was also testimony that on the afternoon of June 20th Pereira, accompanied by a woman, registered as "Victor Perry" at a hotel in Oklahoma City (R. 88-92).

There was no direct testimony as to the deposit in any mail depository of the check of Fewel & Company in the amount of $35,286.78 (G-4, 33) and its transmission by mail to the Citizens National Trust & Savings Bank for collection. An officer of the State National Bank at Dallas testified that, according to the bank's records, the check was entered for collection and sent by mail to the Citizens National Bank with instructions to "wire fate", wire advice of payment was later received, and payment made to Pereira (R. 95-99). A clerk of the bank testified that the check was deposited for collection and sent to California, and the alleged proceeds paid to Pereira, but it is apparent that his testimony as to the alleged mailing was also based on the records of the bank rather than being first-hand (R. 104-105).

There was evidence that a telegram sent on April 24, 1951 from Denver, signed "Curtis" and addressed to Pereira at Roswell, giving a purported net figure of a property settlement as $48,895 (G-10, R. 68, 66-67) was sent by a friend of Pereira named Gibson after receiving the

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text from Pereira in the form of a written message in his handwriting (R. 70-75).

The defendants did not testify or offer evidence in their own behalf, but rested at the end of the Government's case (R. 109).

* * *

After dismissal of eight counts charging mail fraud, the jury convicted the petitioners of the charge of mail fraud under the first count, of transporting stolen property under the tenth count, and conspiracy under the eleventh count (R. 141). The sentence of the Court was the maximum confinement under Count One, five years; the maximum confinement under Count Ten, ten years, to run concurrently; and a cumulative sentence of two years under Count Eleven (R. 143-145).

The Court of Appeals affirmed the judgment, Hutcheson, Ch. J., dissenting in part (R. 160). The Court held that the testimony of Mrs. Pereira (now once more Mrs. Joyce) was in general admissible against her husband by reason of the divorce prior to the trial. It held, moreover, that the petitioner Pereira could not assert his privilege against the disclosure of confidential matrimonial communications made to his wife during the marriage, because as far as he was concerned the marriage was a mere "sham and pretense". The Court held that when the check of $35,286.78 received by Mrs. Pereira from her brokers and endorsed by her to him was mailed for collection by the El Paso bank to the Los Angeles bank on which it had been drawn, that mailing constituted the mailing referred to in the first count, the interstate transportation of a security obtained by fraud as charged in the tenth count, and the culmination of the conspiracy charged in the eleventh (R. 148-158).

Hutcheson, Ch. J., concurred in the affirmance as to both petitioners on Count One, the mail fraud count, and as to

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Pereira on Count Ten, the transportation count. He dissented as to Brading on Count Ten because proof that Brading caused the transportation was wholly lacking. He also dissented as to both petitioners on Count Eleven, the conspiracy count, on the ground that conviction as to that count and the cumulative sentence amounted to double jeopardy; and on the further ground that, following *United States* v. *Crimmins*, 123 F. 2d 271 (C. C. A. 2d), the fact that a jury might have found the petitioners guilty of the substantive offense did not authorize a conviction of the conspiracy (R. 158-159).

Specification of Errors.

1. The Court of Appeals erred in holding that the wife of a defendant in a criminal case may testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals.

2. The Court erred also in holding that the matrimonial privilege against disclosure of confidential communications may be rejected on the ground that the marriage is "sham", and such communications disclosed, in a case where the marriage was undoubtedly valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited as man and wife but so held themselves out to the world.

3. The Court erred, further, in holding that when an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a con-

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spiracy, conviction of the conspiracy count followed by a cumulative sentence on that count does not amount to double jeopardy.

4. The Court erred in holding that there may be a conviction of conspiracy to use the mails to defraud and to transport stolen property across State lines in the absence of evidence of any agreement to do so.

5. The Court erred in holding that the boundaries of Federal criminal jurisdiction may be extended into the proper domain of local law enforcement authorities in order to deal with transactions amounting to ordinary larceny by fraud, through interpretation of the mail fraud and stolen property statutes, where the jurisdictional facts, the use of the mails and the transportation in interstate commerce, are not proved.

Statutes Involved.

62 Stat. 763, 18 U. S. C. 1341 (Mail Fraud):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

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62 Stat. 806, 18 U. S. C. 2314 (National Stolen Property Act):

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . .

62 Stat. 701, 18 U. S. C. 371 (Conspiracy):

If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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ARGUMENT.

Summary of the Argument.

Point I. Under Rule 26 of the Rules of Criminal Procedure and the decisions of this Court, the wife of a defendant in a criminal case may not testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals. The matrimonial privilege against disclosure of confidential communications may not be rejected on the ground that the marriage is "sham" when the marriage was valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited but held themselves out as man and wife.

Point II. When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a conspiracy, conviction on the conspiracy count, followed by a cumulative sentence, amounts to double jeopardy.

Point III. In the absence of evidence of any agreement to use the mails to defraud or to transport stolen property across State lines, a count charging conspiracy to commit those offenses must fall.

Point IV. The conviction of the petitioners of the substantive offenses of using the mails to defraud and of transporting stolen property was unsupported by proof of the crucial fact of the mailing, and represents an unwarranted extension of Federal criminal jurisdiction into the proper domain of local law enforcement authorities.

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POINT I.

Under Rule 26 of the Rules of Criminal Procedure and the decisions of this Court, the wife of a defendant in a criminal case may not testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals. The matrimonial privilege against disclosure of confidential communications may not be rejected on the ground that the marriage is "sham" when the marriage was valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited but held themselves out as man and wife.

The evidence which, in the view of the Government, shows that the delivery by Mrs. Pereira of the check of Fewel & Company to her husband was obtained by fraud, was principally her own testimony. At the time of the principal material misrepresentations as to which she testified, and of the alleged consummation of the fraud and the mailing, she was the wife of the petitioner Pereira. They were married on May 25, 1951 (R. 10), and the alleged operative facts as to which she testified occurred thereafter during May and June (R. 29-63). They were not divorced until November 16, 1951 (R. 10), more than a month after the date of the indictment (R. 1) and less than two months before the trial (R. 8).

Under continuing objection on the ground that her testimony related to confidential communications between husband and wife (R. 10, 28, 29, 32, 36), she testified to the following alleged conversations and events, among others:

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She sold some securities in California and obtained from her brokers, Fewel & Company, a check for $6,956.55 (R. 25-26, G-3). She gave her husband this check when a Cadillac automobile which he was purchasing was ready for delivery (R. 25-26). He stated that the car would cost $4,750 (R. 26). She told him that she wanted the rest of the money returned to her, and he replied that they would settle all that later (R. 26). He kept the money and did not return it to her (R. 26).

Over the same objection, which was explicitly reiterated (R. 29), she was permitted to relate the following conversation: Pereira said that if she wanted to go in with him on the investment, he could buy the Washington Hotel for $78,000 (R. 29). She told him that she had some securities she could sell, on which she was not making a large return (R. 29). She said that she knew that he was capable and she trusted him; and she offered to sell the securities (R. 29). When she was unable to reach her brokers by telephone, he suggested that she telephone them when they returned home (R. 29). He said that he had a broker named E. J. Wilson in Fort Worth, whom he was going to see about this deal, and that he had not really made up his mind about it until she said she would put up the money (R. 29). When Pereira returned after an absence he reported that they had obtained the hotel "for a song"; that there was an old man running it for years who wanted to get rid of it; that it was a wonderful deal, and that he had an option on it (R. 29).

Over the same objection, she was permitted to testify that her husband went to Fort Worth to see about the hotel, told her that he had obtained an option on it and that he had paid $2,500 down, and produced a purported option (R. 30). He told her that he had telephoned his lawyer and obtained $2,500, which he had used to make the down payment (R. 30). About June 15, her husband told her that

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he had telephoned Wilson's secretary, and received a telegram granting an extension of the option (R. 30-31). When the check from Fewel & Company arrived, they discussed their affairs and decided that they would bank the money in El Paso because she didn't want everybody in Roswell, her home town, to know about the deal (R. 31). Pereira told her that he was going to El Paso to sign some papers in liquidation of his prior divorce, and for which money was waiting for him in El Paso (R. 32). She delivered and indorsed the check to him (R. 32). On June 18, 1951, Pereira told her that he was going to leave early next morning and be back early that afternoon, and that he would pay her what he owed her the next day (R. 34-35).

Rule 26 of the Federal Rules of Criminal Procedure provides in part:

> "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."

We assume that the divorce, although it occurred after the date of the indictment and shortly before the trial, rendered Mrs. Pereira competent to testify against her former husband. 8 WIGMORE, EVIDENCE, Sec. 2237. But the husband's privilege against disclosure of confidential communications by him to his wife, which is the privilege here asserted by Pereira, is quite distinct from the general privilege excluding the testimony of one spouse against the other. *Wolfle* v. *United States*, 291 U. S. 7, 13-14. It is settled that the special marital privilege against the disclosure of confidential communications, as distinguished from the general privilege prohibiting testimony by one spouse against another, survives a divorce.

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8 WIGMORE, EVIDENCE, Sec. 2341(2);
United States v. *Mitchell,* 137 F. 2d 1006 (C. C. A. 2d);
United States v. *Walker,* 176 F. 2d 564 (C. A. 2d), *cert. den.* 338 U. S. 891.

In *Bassett* v. *United States,* 137 U. S. 496, in reversing a conviction for polygamy on the ground that the testimony of the lawful wife as to disclosures by her husband of his second marriage was improperly permitted, this Court sustained the following single assignment of error (see 137 U. S. at 497):

> "The District Court erred in permitting Mrs. Sarah Bassett, the former legal [i. e. the first] wife of the plaintiff in error, against his objection, to testify to a confidential communication made to her by him, while they were husband and wife, and not in the presence of any other person."

Brewer, J., speaking for the Court (at 505) quoted from *Stein* v. *Bowman,* 13 Pet. (38 U. S.) 209, 222, in which Mr. Justice McLean said:

> "It is, however, admitted in all the cases that the wife is not competent, except in cases of violence upon her person, directly to incriminate her husband, *or to disclose that which she has learned from him in their confidential intercourse.*" (Italics supplied.)

Bassett v. *United States* was decided under statutes which were, like Rule 26, declaratory of the common law. (See 137 U. S. at 504; 2 WIGMORE, EVIDENCE, Sec. 488, p. 574; *Overton* v. *State,* 43 Tex. 616, 618-9.) The opinion of this Court in the *Bassett* case was clearly based upon the common law privilege against the disclosure of confidential marital communications. As recently as *Blau* v. *United*

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States, 340 U. S. 332, 333-334, the Court reaffirmed that it had "no doubt" as to the privilege. See also *United States* v. *Walker,* 176 F. 2d 564, 567 (C. A. 2d), *cert. den.* 338 U. S. 891.

Assuming that the privilege against the disclosure of confidential marital communications is limited, like the privilege against anti-marital testimony, to exclude cases where the alleged injury is to the wife's person or her morals (8 WIGMORE, EVIDENCE, Sec. 2338), this is clearly not such a case as falls within that narrow exception. It does not involve any offense against her person or subjection of her to any moral degradation such as appears in the Mann Act cases. See *Shores* v. *United States,* 174 F. 2d 838 (C. A. 8th); *United States* v. *Mitchell,* 137 F. 2d 1006 (C. C. A. 2d). By the great weight of authority as well as on principle, offenses against the wife's property do not come within the exception. *Overton* v. *State,* 43 Tex. 616, 618; *People* v. *Ernst,* 306 Ill. 452, 138 N. E. 116; Note (1950) 98 U. of Pa. L. Rev. 719, 726; *cf. Hopkins* v. *Grimshaw,* 165 U. S. 342.*

The observation in *Blau* v. *United States,* 340 U. S. 332, 333, that marital communications are "presumptively confidential" means simply that they are deemed to be confidential unless the contrary is proved. 8 WIGMORE, EVIDENCE, Sec. 2336, cited at 340 U. S. 332, 333. These conversations and communications occurred between husband and wife in private, and neither in the presence of nor through any other person. There is no evidence that they were intended for transmission to others, or that they were not intended to be confidential; indeed, the reverse is the case.

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* Acts or transactions as well as conversations fall within the scope of the privilege. *People* v. *Daghita,* 299 N. Y. 194, 86 N. E. 2d 172; *Menafee* v. *Commonwealth,* 189 Va. 900, 55 S. E. 2d 9; Annot. 10 A. L. R. 2d 1389; see 8 WIGMORE EVIDENCE, Sec. 2337.

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That all of these conferences and communications were confidential and were intended to be so is shown by all the surrounding circumstances: Mrs. Pereira disclosed nothing of them to Miss Joyner, her half sister (R. 65) and explicitly said that she wanted her to know nothing about them (R. 59). She asked that Pereira refrain from discussing them with Brading (R. 58-59). She insisted that she did not want people in Roswell to know about these transactions (R. 31, 58); indeed, this was the reason why, at her suggestion, the check from Fewel & Company was deposited in the bank in El Paso rather than at Roswell (R. 31).

The Court of Appeals appeared to recognize that the communications and conversations which are the basis of the Government's case were confidential and privileged, saying:

> "... Her competency to testify to any communications between husband and wife which were confidential and privileged remained unaffected by the divorce. [Citing authorities]" (R. 153).

The Court held, however, that "insofar as the defendant Pereira was concerned" the marriage relation was merely a sham used as a means to perpetrate a fraud, and that the privilege against disclosure of confidential communications was not available to him (R. 153).

This was error. There is no question that the marriage was valid as between the parties; indeed, the divorce was a conclusive adjudication to that effect. 2 FREEMAN, JUDGMENTS (5th ed. 1925) Sec. 906; see *Williams* v. *North Carolina,* 325 U. S. 226, 232. There was no express or implied reservation by either party. The marriage was consummated, they cohabited as man and wife, and they held themselves out to the world as married. They agreed,

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without reservation, to marry (R. 23-24). The wedding ceremony in Kansas City was attended by all of the bride's friends residing there, "very prominent people in Kansas City" (R. 24-25), and the bride and groom attended a cocktail party in their honor at the home of some of them (R. 25). They attended a ball at Roswell, where she "wanted everyone to meet" Pereira (R. 30). They lived at Roswell as husband and wife (R. 30-40). Pereira paid by his own check such expenses as the salary of the man-servant at her home (G-7, R. 40, 38) and her doctor's bill (G-8, R. 40, 38). Mail addressed to her as "Mrs. Gertrude Joyce Pereira" was delivered (G-5, R. 36-37). They dealt as husband and wife with an automobile dealer who sold them a Cadillac (R. 48, 72). They visited friends as husband and wife (R. 32-33, 38, 84-85).

In *Lutwak* v. *United States,* 344 U. S. 604, in which this Court held that the wives of the defendants were competent witnesses against their husbands, and by inference free from the privilege against disclosure of marital communications, the marriage ceremonies were indeed sham, being entered into under explicit agreements that the ceremonies were to be of no effect. The parties never cohabited as spouses, and never intended to do so; and the marriages were properly held to be void *ab initio* (344 U. S. at 613-615). The case at bar, however, is more than even a "limited purpose" marriage, to which this Court referred as presenting a different problem (344 U. S. at 612).

The authorities cited by the Court of Appeals (R. 284-285) as avoiding the privilege against confidential communications in this case are not in point. Indeed, that Court has misread 8 WIGMORE, EVIDENCE, Sec. 2230, n. 3. The passage cited, referring to the privilege against anti-marital testimony, says that the benefits of the privilege

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> ". . . are gained by the ingenious wrongdoer who brings himself within its formal terms by marrying the witness *after service of subpoena* and thus creating 'ad hoc' a domestic peace which is to be jealously safeguarded." (Italics in original.)

It is clear that the Court of Appeals has simply misread this passage as saying "are *not* gained", and thus innocently reversed its meaning. The actual text supports the petitioners' contentions. In the *Lutwak* case this Court recognized the validity, for the present purpose, of a marriage entered into in order to render the wife incompetent as a witness. 344 U. S. at 612.

Clark v. *United States*, 289 U. S. 1, 14, cited by the Court of Appeals, did not involve the marital privilege, but concerned the "inveterate but vague tradition" (289 U. S. at 13) against a juror's testifying regarding the jury's deliberations. The importance of that "privilege" cannot be compared with that of the privilege against disclosure of marital confidential communications, in weighing the social values for and against its refusal.

The Government will argue, citing *United States* v. *Graham*, 87 F. Supp. 237 (E. D. Mich.),* that one who has wrecked his marriage by perpetrating a fraud against his wife should not escape punishment by asserting his marital status as a means of suppressing what is likely to be—as in this case it is—the only available proof of the vital elements of the offense.

That argument begs the question, and overlooks the reason for the privilege. The rule of privilege arising out of certain personal relationships deliberately suppresses evidence in a particular case for the purpose of protecting

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* The question of confidential communications was not actually presented in the *Graham* case since the Court there found that no confidential communications were involved. See 87 F. Supp. at 238.

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the integrity of the social institution exemplified by that relationship, because the protection of the social institution is deemed a greater good in the long run than the disclosure of truth in one case. 8 WIGMORE, EVIDENCE Sec. 2336. The priest is forbidden to testify because preservation of the secrecy of the confessional is deemed a greater good in the long run than disclosure of the truth in the particular case; the physician is forbidden to testify because the healing of disease as facilitated by the patient's full confidence is deemed a greater good in the long run than disclosure of the truth in one case; the attorney is forbidden to testify because the need of society for his effective advice to his client is deemed a greater good in the long run than punishment for a particular offense. As this Court said in *Wolfle* v. *United States*, 291 U. S. 7, 14, through Mr. Justice Stone:

> "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."

A defendant in a criminal case invokes in his own behalf the privilege against disclosure of confidential communications between him and his spouse. When the Court grants that privilege it does so not for his sake but for the sake of the others, and for the preservation and strengthening of marriage as a social institution.

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POINT II.

When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a conspiracy, conviction on the conspiracy count, followed by a cumulative sentence, amounts to double jeopardy.

Hutcheson, Ch. J., dissented from the decision of the Court of Appeals sustaining the conviction on the eleventh count, which charged a conspiracy to commit the offenses charged in the first ten substantive counts. The second to ninth counts inclusive, which all charged a scheme to commit mail fraud, were dismissed on the Government's motion (R. 109). In his dissent Hutcheson, Ch. J., said (R. 159):

> "I am in no doubt that as a general rule a conspiracy count and a substantive count cannot be said to charge the same offense so that one excludes the other. I am equally in no doubt, however, that where, as here, the indictment merely charges that the conspiracy was to commit the same offenses charged in the substantive counts, a conviction on two of those counts and a dismissal of all the others, followed by a conviction and cumulative sentence on the conspiracy count, is to run a good principle into the ground, and make double jeopardy of the conspiracy count and the sentence on it."

This Court has recognized that the conspiracy statute is being much abused, and has been carried beyond the theory which supposes a serious and substantially continued group scheme for cooperative law breaking; and that the joinder of conspiracy and substantive counts

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especially is being used arbitrarily and harshly. *Pinkerton* v. *United States,* 328 U. S. 640, 644, n. 4.

In determining whether the joinder of the conspiracy count with the substantive counts amounts to double jeopardy within the meaning of the Fifth Amendment to the Constitution,

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States,* 284 U. S. 299, 304.

Each of the substantive counts alleges that the two petitioners joined in a scheme to commit the acts which the conspiracy count charges them with conspiring to commit (R. 1-6). Under the terms of this indictment it is plain that, as this Court said in *Pinkerton* v. *United States,* 328 U. S. 640, 644:

> "A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy."

It has accordingly long been settled law that the rules of evidence applicable in such a case are the same as those where a conspiracy is charged.

Blue v. *United States,* 138 F. 2d 351, 358 (C. C. A. 6th), *cert. den.* 322 U. S. 736-737;
Robinson v. *United States,* 33 F. 2d 238 (C. C. A. 9th);
Van Riper v. *United States,* 13 F. 2d 961 (C. C. A. 2d).

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It has also long been settled that, just as where a conspiracy is charged, the act of each participant in furtherance of the common scheme is deemed the act of all.

Blue v. *United States,* 138 F. 2d 351, 358 (C. C. A. 6th) *cert. den.* 322 U. S. 736-737;
Davis v. *United States,* 12 F. 2d 253 (C. C. A. 5th), *cert. den.* 271 U. S. 688.

The scheme thus charged in the Eleventh Count is precisely the same as that charged in the substantive counts. By its terms it alleges that the petitioners (R. 6)

> "... unlawfully and knowingly conspired to commit the various offenses against the United States which are fully described and set out in the first ten counts of this indictment ..."

As this Court held in *Braverman* v. *United States,* 317 U. S. 49, such an indictment, taken as a whole, charges only one offense and may be the basis of only one punishment:

> "Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one" (317 U. S. at 53).

See also:

Sealfon v. *United States,* 332 U. S. 575;
Krench v. *United States,* 42 F. 2d 354, 356 (C. C. A. 6th).

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POINT III.

In the absence of evidence of any agreement to use the mails to defraud or to transport stolen property across State lines, a count charging conspiracy to commit those offenses must fall.

In dissenting from the conviction of the petitioners on the Eleventh Count, charging a conspiracy (R. 6) to "commit the various offenses . . . which are fully described and set out in the first ten counts," Hutcheson, Ch. J. said (R. 159):

> "I dissent from the conviction on this count further on the ground fully discussed in *United States* v. *Crimmins,* 123 F. 2d 271, that it does not follow, because a jury might have found the defendants guilty of the substantive offense, that they were justified in finding them guilty of a conspiracy to commit it.
>
> "In this case, while it was not necessary to prove, under the substantive offenses, that the parties agreed in advance to use the mails and transport stolen securities, it was necessary in proving the conspiracy count to prove that they did so agree.
>
> "While, therefore, in this case, I think the evidence is sufficient as to both defendants to show a violation of substantive count one and the use of the mails in carrying out the scheme, I do not believe that the evidence is sufficient to show that the parties entered into a conspiracy, that is agreed to use the mails under the first count or transport securities under the tenth."

There is no evidence that the petitioners agreed to use the mails to carry out a scheme to defraud, and there is no evidence that they agreed to transport stolen property across State lines. A conspiracy to use the mails to effect

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a scheme to defraud can be proved only by proof of all of the elements of that offense, including an agreement to use the mails for that purpose. *United States* v. *Cohen,* 145 F. 2d 82 (C. C. A. 2d), *cert. den.* 323 U. S. 799, 800; *Mazurosky* v. *United States,* 100 F. 2d 958 (C. C. A. 9th). Similarly, a conspiracy to transport stolen property in interstate commerce requires proof that the parties agreed to transport the stolen property across state lines. *United States* v. *Crimmins,* 123 F. 2d 271 (C. A. 2d); *Cf. Fulbright* v. *United States,* 91 F. 2d 210 (C. C. A. 8th).

As the Second Circuit said in *United States* v. *Crimmins,* 123 F. 2d 271, 273, per Learned Hand, J., in reversing a conviction of conspiracy to transport stolen securities:

> "Courts do indeed say that each conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding [citing cases]."

As Hutcheson, Ch. J., pointed out (R. 159), there was no evidence that Brading agreed to transport or caused to be transported the check in question and therefore no basis for his conviction of the offense of conspiracy. *Gable* v. *United States,* 84 F. 2d 929 (C. C. A. 7th); *Langer* v. *United States,* 76 F. 2d 817 (C. C. A. 8th). In the absence of such an agreement by Brading, we are left with the impossible proposition that Pereira conspired with himself. There is thus no ground for the conviction on the conspiracy count of either of the petitioners.

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POINT IV.

The conviction of the petitioners of the substantive offenses of using the mails to defraud and of transporting stolen property was unsupported by proof of the crucial fact of the mailing, and represents an unwarranted extension of Federal criminal jurisdiction into the proper domain of local law enforcement authorities.

The verdict in a criminal case can be sustained only when there is

> ". . . relevant evidence from which the jury may properly find or infer, beyond a reasonable doubt"

every element of the offense with which the accused is charged. *Mortensen* v. *United States,* 322 U. S. 369, 374.

It is well established that the jurisdictional fact of the mailing is the gist of the offense of using the mails to defraud, and must be proved by competent evidence in order to sustain a substantive count charging that offense. *Rosenberg* v. *United States,* 120 F. 2d 935 (C. C. A. 10th); *Whealton* v. *United States,* 113 F. 2d 710 (C. C. A. 3d); *United States* v. *Baker,* 50 F. 2d 122 (C. C. A. 2d). The mailing may of course be proved in appropriate fashion by circumstantial evidence or by reference to an established customary mailing procedure. *Decker* v. *United States,* 140 F. 2d 378 (C. A. 4th), *cert. den.* 321 U. S. 792.

The same considerations necessarily apply to a substantive charge of transporting stolen property by means of the mails; the interstate transportation is the gist of the offense. *United States* v. *Handler,* 142 F. 2d 351 (C. C. A. 2d), *cert. den.* 323 U. S. 741; *United States* v. *Sheridan,* 329 U. S. 379, 386-390.

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The evidence in support of the mailing was largely the testimony of Uhlig, a vice-president of the State National Bank of El Paso, Texas, with which Pereira deposited the check for collection (R. 94-100). Uhlig had no personal knowledge of the transaction (R. 99). His testimony that the mailing occurred was merely his interpretation of unidentified records which were not introduced in evidence, and pencil memoranda or copies of at least some of those records (R. 96, 98-99). He testified that there was a letter of transmittal, but no letter of transmittal was introduced in evidence (R. 99), nor was there any evidence of any customary practice of mailing to support his testimony about the bank's records in order to establish a basis for admission of the letter of transmittal if it had been offered in evidence.

A ledger sheet purporting to report the deposits into and withdrawals from Pereira's account with the bank was introduced in evidence (G-14, R. 95-96), but it contains no reference to the check for $35,286.01 which is the subject of the three counts on which the defendants were convicted (G-4, R. 33).

There was testimony about a wired advice of payment received from Citizens National Bank, but no such document was offered in evidence (R. 98, 99). The only evidence on this subject, as on the mailing itself, was Uhlig's testimony as to records or copies of records not introduced in evidence (R. 99-100).

The only other testimony relating to the alleged mailing was that of Foster, a bank clerk at the State National Bank (R. 104-106). He testified that he sent the check to Los Angeles for collection (R. 104), but it is clear that he also was testifying on the basis of records not introduced in evidence (R. 104-105); the questions which elicited his answers repeatedly referred to such records (R. 105). Examination of all of his testimony shows that he was

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testifying to no more than the ordinary performance of the duties of his position as clerk, and that his reference to the alleged mailing was no more than an inference. He did not testify, nor was there any other testimony, that on a specified date he or any other person deposited the check in any specified mail depository at any specified time. There was thus no first-hand testimony as to mailing. The bank's records themselves as to the alleged mailing were not introduced in evidence, nor was there any evidence of any customary practice of mailing to support them. Nor was there testimony by any officer of Fewel & Company, the recipients, that the check was actually received through the mails—testimony which would have amounted to circumstantial evidence of mailing. *Cf. Stokes* v. *United States,* 157 U. S. 187; *Greenbaum* v. *United States,* 80 F. 2d 113 (C. C. A. 9th). Common law evidence of the fact of the mailing—the vital jurisdictional fact on which the conviction of the defendants under Counts One and Ten rested—was entirely absent.

The evidence was thus insufficient to prove that the mails were used. *Mackett* v. *United States,* 90 F. 2d 462 (C. C. A. 7th); *United States* v. *Baker,* 50 F. 2d 122 (C. C. A. 2d); *Brady* v. *United States,* 24 F. 2d 399 (C. C. A. 8th). The question was appropriately reserved by the petitioners' motion for acquittal for failure of proof (R. 114-115, Pars. I, III, VI).

• • •

The transactions which are the subject of this case amounted at most to no more than a typical common law fraud constituting larceny by trick. The loan of $5,000 which Brading obtained for Pereira from Mrs. Pereira by means of alleged false representations, and of which much is made in the indictment (R. 1-6) and the Government's case

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(R. 15-17) had nothing to do with the mails or interstate commerce at all. The alleged mailing of the Fewel & Company check was no more than a by-product, rather than an element, of the scheme.

Federal jurisdiction has here been extended into a field which is the proper realm of local law enforcement authorities, and in which there is no reason to believe they are not performing their duty. The protection of the Federal system of law enforcement from the imposition on it of such matters of properly local concern requires that, at the very least, the jurisdictional fact of the mailing be proved by proper common law proof as Rule 26 of the Rules of Criminal Procedure requires. Defendants in a criminal case, no matter how plain their guilt may seem to the Court, are entitled to be dealt with according to law:

> "In view of the Government's insistence that there is abundant evidence . . . it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." *Bollenbach* v. *United States,* 326 U. S. 607, 614.

Conclusion.

The testimony of the former wife of the defendant Pereira was erroneously admitted as to confidential communications during the marriage. Count Eleven of the indictment subjected the defendants to double jeopardy in view of the allegations of Counts One and Ten. There was no evidence of any agreement to use the mails to defraud or to transport stolen property across state lines, and the charge of conspiracy in Count Eleven must therefore fall. The conviction of the offenses of using the mails to defraud and of transporting stolen property was unsupported by proof of the crucial fact of the mailing, and represents an unwarranted extension of federal criminal jurisdiction into the proper domain of law enforcement authorities. The judgment of conviction should therefore be reversed.

Dated: September 28, 1953.

Respectfully submitted,

CHARLES L. SYLVESTER,
WILLIAM H. FRYER,
SIDNEY G. KINGSLEY,
Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 764

VICTOR EMANUEL PEREIRA AND EUGENE H. BRADING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 279–290) is reported at 202 F. 2d 830.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1953 (R. 291). A petition for rehearing was filed March 26, 1953 (R. 292–297), and denied on April 3, 1953 (R. 299). The petition for a writ of certiorari was filed on April 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

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QUESTIONS PRESENTED

1. Whether the trial court erred in admitting testimony by a divorced wife, who was the victim of a fraud, as to certain communications, asserted to be confidential, from her then husband, who was one of the perpetrators of the fraud.

2. Whether conviction and the imposition of a cumulative sentence on a charge of conspiracy to commit the substantive offenses charged in the indictment amounted to double jeopardy.

3. Whether there was sufficient evidence to sustain the conviction on the conspiracy count.

4. Whether there was sufficient evidence of the mailing of the fraudulently obtained check to sustain the convictions of both petitioners for using the mails in executing a scheme to defraud and causing the interstate transportation of an article obtained by fraud.

STATUTES INVOLVED

18 U. S. C. (Supp. V) 1341, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent

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> or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon * * * any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U. S. C. (Supp. V) 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * * Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * *

18 U. S. C. (Supp. V) 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

STATEMENT

Petitioners were convicted on three counts—one, ten and eleven—of an indictment returned

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against them in the United States District Court for the Western District of Texas (R. 1–9, 257),[1] all of which arose out of a scheme to defraud the former wife of Pereira. Count one charged that petitioners, for the purpose of executing this scheme, caused a letter to be mailed on June 15, 1951, to the Citizen's National Trust & Savings Bank, Los Angeles, California, in violation of 18 U. S. C. 1341, *supra,* pp. 2–3 (R. 2–3). Count ten charged that on or about the same date petitioners caused a check in the amount of $35,286.78 to be transported in interstate commerce from El Paso, Texas, to Los Angeles, California, knowing such check to have been obtained by fraud, in violation of 18 U. S. C. 2314, *supra,* p. 3 (R. 8). Count eleven charged petitioners with conspiring to commit the substantive offenses charged in the preceding counts (R. 8–9). The court sentenced both men to five years' imprisonment on count one, ten years on count ten to run concurrently with the sentence under count one, and two years on count eleven to commence at the expiration of the sentence on count ten (R. 261). On appeal, the judgment of conviction was affirmed as to both petitioners by the Court of Appeals for the Fifth Circuit, Chief Judge Hutcheson dissenting in part (R. 291).

At the trial the Government relied principally upon the testimony of the victim, Mrs. Joyce, who

[1] At the close of the Government's case, the Government moved to dismiss counts 2 through 9, no proof having been attempted as to those counts (R. 209).

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had been married to petitioner Pereira but was divorced from him by the time of the trial (R. 61). Corroboration of significant points of her testimony and proof of certain elements of the offenses charged in the indictment were, however, provided by other Government witnesses. Petitioners presented no witnesses and did not take the stand on their own behalf.

Mrs. Joyce gave the following account:

She first met petitioners when one of them, Brading (known to her as James Bradley Lee), approached her in the Del Norte Hotel in El Paso, Texas, on April 19, 1951, and started a conversation (R. 62–64). When he invited her and her half-sister, Miss Joyner, to join him and a friend (petitioner Pereira) in the cocktail lounge, she accepted the invitation. This was followed by a trip to Juarez, Mexico, for dinner and a tour of the night spots (R. 65–67). Petitioner Pereira appeared to be delighted with her, told her that meeting her was an "epoch in his life," and represented that he was in the hotel business in Denver and was in the process of getting a divorce (R. 66). Within a short time petitioners were invited to stay as house guests at Mrs. Joyce's home in Roswell, New Mexico (R. 67). There Pereira received a telegram informing him that his divorce would be final on April 27 but that he would not receive his property settlement for another month (R. 68). Mrs. Joyce was informed by petitioner Brading that the delay with respect

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to the settlement was quite unfortunate for Pereira since it might cause him to miss out on some very promising oil deals (R. 69). She thereupon borrowed the $5,000 that Brading indicated was needed and loaned this sum to Pereira (R. 71).

A few days later, Pereira suggested to Mrs. Joyce that they take a trip together so that they might get better acquainted (R. 72). At Wichita Falls, Texas, their first stop, petitioner Brading joined them (R. 74), and a few days later, on about May 15, the three of them drove to Dallas (R. 77). After spending a few days in Dallas, Pereira and Mrs. Joyce motored to Hot Springs, Arkansas, where they decided they were in love and would get married (R. 81). When Brading arrived at Hot Springs, Pereira told him in the victim's presence that in view of his impending marriage he would have to get out of the oil business and would get a hotel "here in East Texas because I must have an income" (R. 82). Shortly thereafter Pereira and Mrs. Joyce flew to Kansas City where they were married on May 25, 1951 (R. 83).

Two or three days after the wedding, Pereira began what purported to be negotiations for the purchase of a hotel in Greenville, Texas (R. 87). It is this transaction that underlies counts one and ten of the indictment. In the presence of Brading, Pereira informed Mrs. Joyce that he had found a hotel that he thought he would be

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interested in buying, and proposed that the three of them, together with Miss Joyner, should stop at Greenville and look it over on their way to Dallas. When they went into the hotel, Pereira cautioned them not to indicate that they were interested in buying but just to "look at it from an outsider's viewpoint." (R. 89.)

In Dallas, Pereira proposed that Mrs. Joyce go in with him on the deal. She attempted to contact her broker in California to get him to sell some securities, but was unable to reach him at that time. Pereira then went to see his ostensible broker, one E. J. Wilson, in Fort Worth, and returned with what he represented to be an option to buy the hotel at Greenville. (R. 90.) Mrs. Joyce heard Pereira call his lawyer in Denver for the supposed purpose of getting $2,500 for the down payment (R. 91–92). Subsequently, she heard Pereira call his broker, Wilson, and ask for an extension on the option. A few days later the extension was confirmed by a telegram from Mr. Wilson. (R. 93.)

About the same time Mrs. Joyce, having meanwhile contacted her broker, received a check for about $35,000 (R. 93) [2] which shortly thereafter she endorsed to Pereira, who then took it to the State National Bank at El Paso (R. 94). A few days later Pereira made arrangements to go to Greenville with Mrs. Joyce in order to close the

[2] This check was introduced in evidence as Government Exhibit G–4 (R. 95).

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hotel deal on June 20. However, on the 19th he and Brading left in Mrs. Joyce's Cadillac, and that was the last she saw of either of them until the trial. (R. 98–99.)

Mrs. Joyce's half-sister, Miss Joyner, testified that they had met petitioners in the way Mrs. Joyce had described, that a courtship started between Pereira and Mrs. Joyce, that Pereira had indicated he was about to get a divorce, and that they had stopped at Greenville so that Pereira might look over the hotel (R. 139–143). A relative of Mrs. Joyce testified that she had met Pereira, that he had said he loved Mrs. Joyce, and that he was the owner of several hotels and was going to Greenville to take an option on another (R. 171–174).

The clerks of the two Denver courts having divorce jurisdiction testified that there was no record that anyone with a name like Pereira had a divorce action pending during 1951 (R. 144, 160). The owner and the lessee of the Washington Hotel in Greenville both testified that, at the time Pereira ostensibly was negotiating for the purchase of the hotel, no one by the name of Pereira or Wilson had ever approached either of them about buying the hotel or obtaining any option to buy (R. 149, 161). A Denver friend of Pereira's testified that he received a letter from Pereira enclosing a printed telegram blank signed "Curtis;" that the telegram stated that Pereira's divorce would be final effective April 28, and his

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property settlement would be about $48,000; and that he had sent this telegram to Pereira at Roswell, New Mexico (R. 150–155, 147). An F. B. I. handwriting expert testified that the printing on the telegram blank was Pereira's (R. 198). Another Government witness, the operator of a telephone answering service in Fort Worth, identified petitioner Brading as a former customer who was known to the witness as E. J. Wilson (R. 207).

A vice president of the State National Bank at El Paso testified that Pereira had an account there, that a cashier's check payable to Pereira for $35,286.01 had been issued, and that the paying teller's stamp showed payment on June 19, 1951, the day petitioners had left Roswell in Mrs. Joyce's Cadillac (R. 186–194). A clerk in the same bank testified that Pereira came to his window and presented a check drawn on a California bank for about $35,000, that he had forwarded the check to Los Angeles for collection, that after payment by the Los Angeles bank he had issued a cashier's check to Pereira, and that the paying teller had asked him to identify Pereira, which he had done (R. 202–203). The bank vice president had testified earlier that the check had been forwarded to the Los Angeles Bank through the United States mails (R. 193).

ARGUMENT

1. Petitioners contend that certain testimony by Mrs. Joyce related to confidential communi-

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cations between her and her then husband, Pereira, and was improperly admitted at the trial. It is true that the privilege for marital confidences survives divorce (8 Wigmore, § 2341 (2)), but in the circumstances of the present case it has no application, even assuming that the communications were of the sort ordinarily given protection.[3]

The court below held that the privilege did not apply because "the marriage relation was merely a sham and a pretense dishonestly assumed as a means of perpetrating a fraud" (R. 284). Cf. *Clark* v. *United States,* 289 U. S. 1. This sound reasoning finds support in the recent decision of this Court in *Lutwak* v. *United States,* 344 U. S. 604, where the Court held that an ostensible spouse who had entered into a sham marriage could not invoke the fraudulent marital status as a basis for excluding the other spouse's testimony.

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[3] One of the conversations objected to occurred in the presence of a third person (R. 88), and so was not privileged (*Wolfle* v. *United States*, 291 U. S. 7, 14); two of the alleged confidential communications involved the taking of money by Pereira (R. 84, 93), which is not ordinarily a communication within the scope of the privilege (8 Wigmore, § 2337; see *United States* v. *Mitchell*, 137 F. 2d 1006, 1009 (C. A. 2), certiorari denied, 321 U. S. 794); and the final conversation to which objection was made related to Pereira's invitation to join with him in the hotel venture (R. 90). Since even this conversation concerned prospective business transactions which by their nature would require communications to third persons, it is doubtful whether the privilege should apply. *Dobbins* v. *United States*, 157 F. 2d 257, 260 (C. A. D. C.).

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Here, as in *Lutwak,* it would be a "hollow mockery" (344 U. S. at 615) to apply the policy of preserving and fostering the marital relationship, which underlies the marital confidences privilege (8 Wigmore, § 2332) as well as the privilege against a spouse's adverse testimony, to a case where the marriage was from its inception, at least on the part of the party claiming the privilege, not *bona fide* but for the sole purpose of perpetrating a fraud.

It is, however, not necessary to rely on the *Lutwak* case in order to hold the privilege inapplicable. It has long been recognized that the marital communications privilege is subject to exception where the purpose of the proposed testimony is to prove an injury by the defendant to the spouse who is testifying. 8 Wigmore, § 2338 (1). This exception has been applied in criminal prosecutions where a husband had transported his wife in interstate commerce for immoral purposes. *Hayes* v. *United States,* 168 F. 2d 996 (C. A. 10); *United States* v. *Mitchell,* 137 F. 2d 1006 (C. A. 2), certiorari denied, 321 U. S. 794. And in *United States* v. *Graham,* 87 F. Supp. 237 (E. D. Mich.), as in the present case, the court held that a wife could testify against her husband at a trial for transporting in interstate commerce a sum of money taken from her by fraud. The propriety of this conclusion seems obvious; it works a grotesque distortion to hold that a party, having wrecked his marriage

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by perpetrating a crime against his spouse, may escape punishment by asserting his marital status as a means of suppressing what is likely to be the only available proof of the offense.

In *United States* v. *Walker,* 176 F. 2d 564 (C. A. 2), certiorari denied, 338 U. S. 891, upon which petitioner mistakenly relies (Pet. 9, 19), the court, in holding that a divorced wife who was not herself the victim of the offense for which her former husband was on trial could not testify as to confidential communications during the marriage, concluded (176 F. 2d at 568):

> We do not forget that a wife from the earliest times was competent to testify against her husband, when the crime was an offense against her person; and we have ourselves extended the exception to the crime of transporting her as a prostitute in interstate commerce * * *. The same exception probably extends to the privilege against the admission of confidential communications. The case at bar is not, however, within this exception *for Clara Duerr Walker was not the victim of the frauds for which the defendant was being tried.* [Emphasis added.]

Here the wife was herself the victim of the fraud, and could therefore testify as to the injury done her.

2. Petitioners' contention that the conspiracy count was improperly included in the indictment is without merit. No double punishment for a

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single offense has resulted from the imposition of a cumulative sentence on the conspiracy count, for conspiracy is a crime separate and distinct from the substantive offense that is the object. As this Court observed in *Pinkerton* v. *United States,* 328 U. S. 640, 644:

> A conspiracy is a partnership in crime. * * * It has ingredients, as well as implications, distinct from the completion of the unlawful project.

This principle is not affected by the circumstance that two persons were charged with having committed each of the substantive offenses. It is true that where two persons must necessarily agree in order to accomplish the substantive crime, it is improper to add a conspiracy count, since all the elements of a conspiracy are present in the completed substantive crime. *United States* v. *Katz,* 271 U. S. 354. However, neither using the mails in a scheme to defraud nor causing the interstate transportation of stolen property necessarily involves the cooperation of two or more persons; the agreement to commit such offenses is a new element of criminality not implied by the substantive crimes. Cf. *United States* v. *Zeuli,* 137 F. 2d 845 (C. A. 2).

Convictions under indictments charging violation of both the mail fraud and the conspiracy statutes have been consistently upheld by courts of appeals (*Mansfield* v. *United States,* 155 F. 2d 952 (C. A. 5), certiorari denied, 329 U. S. 792;

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Blue v. *United States,* 138 F. 2d 351 (C. A. 6), certiorari denied, 322 U. S. 736–737; *Mackett* v. *United States,* 90 F. 2d 462 (C. A. 7); *United States* v. *Bender,* 60 F. 2d 56 (C. A. 2)), as have indictments charging both transporting stolen property in interstate commerce and conspiring to do so. *Allen* v. *United States,* 89 F. 2d 954 (C. A. 4); *Carlson* v. *United States,* 187 F. 2d 366 (C. A. 10), certiorari denied, 341 U. S. 940.

3. Petitioner's argument that there was no proof of agreement to use the mails, and hence insufficient evidence to support the conspiracy count (Pet. 24–26), misconceives the evidence required to support a charge of conspiracy to violate the mail fraud statute.[4] There need not be proof of agreement as to any particular mailing. It is sufficient that there be proof that the scheme to defraud in which the parties joined contemplated the use of the mails in furtherance thereof. *Mansfield* v. *United States, supra; United States* v. *Cohen,* 145 F. 2d 82 (C. A. 2), certiorari denied, 323 U. S. 799.

There was in this case ample evidence that the scheme to defraud contemplated the use of the mails. The plan to have a friend send the tele-

[4] The conspiracy count is established if petitioners are shown to have agreed to commit either one of the substantive offenses charged, since a conspiracy to commit a multiplicity of offenses is no different in legal effect than a conspiracy to commit a single offense. Cf. *Braverman* v. *United States,* 317 U. S. 49. We, therefore, limit our discussion to the mail fraud conspiracy.

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gram signed "Curtis" (See Statement, *supra,* pp. 8–9) was consummated by mail. Pereira's bank account in El Paso, Texas, was opened a few days after Brading had borrowed the first $5,000 for Pereira, on the day that Brading flew to El Paso to meet his co-conspirator (R. 71, 188–189), and it is evident that both parties contemplated that during the courtship which followed checks would be drawn on that account from other parts of the country and mailed for collection. Even as to the particular mailing which formed the basis of the substantive counts, there was evidence from which the jury could properly infer that Brading knew of the contemplated use of the mails. He was with Mr. and Mrs. Pereira when they looked at the hotel in Greenville, and he drove with them to Dallas. After the wife in Dallas tried to call her broker in California to sell the securities, Pereira obtained the option from "Wilson" (See Statement, *supra,* p. 7). Moreover, Brading came to Pereira's home shortly before the proceeds of the check were to be collected and left with him early in the morning on the day that the check was cleared (R. 98–99). All these circumstances, together with the close association of the two throughout the venture, were clearly sufficient to justify the conclusion that Brading knew about and agreed to the contemplated clearance of the California check.

4. Contrary to petitioners' contention (Pet. 26–27), there was ample evidence to show that

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the check was cleared through the mails. The Vice President of the State National Bank at El Paso testified that when the check was deposited for collection it was sent directly to the drawee bank in Los Angeles by mail (R. 192–193). A clerk in the El Paso bank testified that petitioner Pereira had presented the check at his window, and that he personally had sent it to Los Angeles for collection (R. 202).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
HOWARD ADLER, JR.,
Attorneys.

JUNE 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 50

VICTOR EMANUEL PEREIRA AND EUGENE H. BRADING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The majority and dissenting opinions of the Court of Appeals (R. 148–159) are reported at 202 F. 2d 830.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1953 (R. 160). A petition for rehearing was filed March 26, 1953, and denied on April 3, 1953 (R. 161). The petition for a writ of certiorari was filed on April 30, 1953, and was granted on June 15, 1953 (R. 164). The jurisdiction of this Court is invoked under 28 U. S. C.

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1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting testimony by a divorced wife, who was the victim of a fraud, as to certain communications, asserted to be confidential, from her then husband, who was one of the perpetrators of the fraud.

2. Whether there was sufficient evidence of the mailing of the fraudulently obtained check to sustain the convictions of petitioners for using the mails in executing a scheme to defraud and causing the interstate transportation of an article obtained by fraud.

3. Whether conviction and the imposition of a cumulative sentence on a charge of conspiracy to commit the substantive offenses charged in the indictment amounted to double jeopardy.

4. Whether there was sufficient evidence to sustain the conviction on the conspiracy count.

STATUTES AND RULE INVOLVED

18 U. S. C. (Supp. V) 1341, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office

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> or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon * * * any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U. S. C. (Supp. V) 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * * Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * *

18 U. S. C. (Supp. V) 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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Rule 26, Federal Rules of Criminal Procedure

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT

Petitioners were convicted on three counts—one, ten, and eleven—of an indictment returned against them in the United States District Court for the Western District of Texas (R. 1–6),[1] all of which arose out of a scheme to defraud the then wife of Pereira. Count one charged that petitioners, for the purpose of executing this scheme, caused a letter to be mailed on June 15, 1951, to the Citizens National Trust & Savings Bank, Los Angeles, California, in violation of 18 U. S. C. 1341, *supra,* pp. 2–3 (R. 1–2). Count ten charged that on or about the same date petitioners caused a check in the amount of $35,286.78 to be transported in interstate commerce from El Paso, Texas, to Los Angeles, California, knowing such check to have been obtained by fraud,

[1] At the close of the Government's case, the Government moved to dismiss counts 2 through 9, no proof having been attempted as to those counts (R. 109).

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in violation of 18 U. S. C. 2314, *supra*, pp. 3 (R. 5–6). Count eleven charged petitioners with conspiring to commit the substantive offenses charged in the preceding counts (R. 6). The court sentenced both men to five years' imprisonment on count one, ten years on count ten to run concurrently with the sentence under count one, and two years on count eleven to commence at the expiration of the sentence on count ten (R. 143–144). On appeal, the judgment of conviction was affirmed as to both petitioners by the Court of Appeals for the Fifth Circuit, Chief Judge Hutcheson dissenting in part (R. 160).

At the trial the Government relied principally upon the testimony of the victim, Mrs. Joyce, who had been married to petitioner Pereira but was divorced from him by the time of the trial (R. 10). Corroboration of significant points of her testimony and proof of certain elements of the offenses charged in the indictment were, however, provided by other Government witnesses. Petitioners presented no witnesses and did not take the stand on their own behalf.

Mrs. Joyce gave the following account:

She first met petitioners when one of them, Brading (known to her as James Bradley Lee), approached her in the Del Norte Hotel in El Paso, Texas, on April 19, 1951, started a conversation, and invited her and her half-sister, Miss Joyner, to join him and a friend (petitioner Pereira) in the cocktail lounge (R. 12). This

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was followed by a trip to Juarez, Mexico, for dinner and a tour of the night spots (R. 13). Petitioner Pereira appeared to be delighted with her, told her that meeting her was an "epoch in his life," and represented that he was in the hotel business in Denver and was in the process of getting a divorce (*Id.*). Within a short time, petitioners were invited to stay as house guests at Mrs. Joyce's home in Roswell, New Mexico (R. 14). There Pereira received a telegram informing him that his divorce would be final on April 27, but that he would not receive his property settlement for another month (R. 15). Brading informed Mrs. Joyce that this delay with respect to the settlement was quite unfortunate for Pereira since it might cause him to miss out on some promising oil deals, and asked her whether she would not let Pereira borrow the money from her (*Id.*). She thereupon borrowed the $5,000 that Brading indicated was needed and loaned this sum to Pereira (R. 16).

A few days later, Pereira suggested to Mrs. Joyce that they take a trip together so that they might get better acquainted (R. 17). Mrs. Joyce agreed to this, and let Pereira have $1,000 to finance the trip, as he found himself "a little short of money" (R. 18). At Wichita Falls, Texas, their first stop, petitioner Brading joined them (R. 19), and a few days later, on about May 15, the three of them drove to Dallas (R. 22). Then, after spending a few days in Dallas,

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Pereira and Mrs. Joyce motored to Hot Springs, Arkansas, where they decided they were in love and would get married (R. 23). When Brading arrived at Hot Springs, Pereira told him in the victim's presence that in view of his impending marriage he would have to get out of the oil business and would get a hotel "here in East Texas because I must have an income * * *" (*Id.*). Shortly thereafter Pereira and Mrs. Joyce flew to Kansas City where they were married on May 25, 1951 (R. 24).

Two or three days after the wedding, Pereira began talking about the purchase of a hotel in Greenville, Texas (R. 27). It is this transaction that underlies counts one and ten of the indictment. In the presence of Brading, Pereira informed Mrs. Joyce that he had found a hotel that he thought he would be interested in buying, and proposed that the three of them, together with Miss Joyner, should stop at Greenville and look it over on their way to Dallas. When they went into the hotel, Pereira cautioned them not to indicate that they were interested in buying but just to "look at it from an outsider's viewpoint." (R. 28).

Over Pereira's objection that the testimony related to marital confidences, Mrs. Joyce went on to describe the way in which petitioners had defrauded her of $35,000. When they reached Dallas, Pereira had proposed that she go in with him on the deal. She accepted, and sought to

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have her broker in California sell some securities, but was unable to reach him at that time. Pereira then went to see his ostensible broker, one E. J. Wilson, in Fort Worth, and returned with what he represented to be an option to buy the hotel at Greenville. (R. 29.) Later Pereira told Mrs. Joyce that he had called his lawyer in Denver for the supposed purpose of getting $2,500 for the down payment (R. 30). Subsequently, she heard Pereira call his broker, Wilson, and ask for an extension on the option. A few days later the extension was confirmed by a telegram from Mr. Wilson. (R. 31.)

About the same time Mrs. Joyce, having meanwhile contacted her broker, received a check for about $35,000 (R. 32),[2] which shortly thereafter she endorsed to Pereira, who took it to the State National Bank at El Paso (*Id.*). A few days later Pereira made arrangements to go to Greenville with Mrs. Joyce to close the hotel deal on June 20. However, on the 19th he and Brading left in a Cadillac which he had bought with money loaned to him by Mrs. Joyce, and that was the last she saw of either of them until the trial. (R. 35.)

The essential elements of Mrs. Joyce's testimony were corroborated by other Government witnesses.

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[2] This check was introduced in evidence as Government Exhibit G-4 (R. 32).

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Mrs. Joyce's half-sister, Miss Joyner, testified that they had met petitioners in the way Mrs. Joyce had described, that a courtship started between Pereira and Mrs. Joyce, that Pereira had indicated he was about to get a divorce, and that they had stopped at Greenville so that Pereira might look over the hotel (R. 62–65). A relative of Mrs. Joyce testified that she had met Pereira, that he had said he loved Mrs. Joyce, and that he was the owner of several hotels and was going to Greenville to take an option on another (R. 84–86).

The clerks of the two Denver courts having divorce jurisdiction testified that there was no record that anyone with a name like Pereira had a divorce action pending during 1951 (R. 66, 76). The owner and the lessee of the Washington Hotel in Greenville both testified that, at the time Pereira ostensibly was negotiating for the purchase of the hotel, no one by the name of Pereira or Wilson had ever approached either of them about buying the hotel or obtaining any option to buy (R. 69, 77). A Denver friend of Pereira's testified that he received a letter from Pereira enclosing a printed telegram blank signed "Curtis," and that he had sent this telegram to Pereira at Roswell, New Mexico (R. 72–73). This witness identified a telegram addressed to Pereira in Roswell and signed Curtis as the one he had sent (R. 71). This telegram (Govt. Ex. 10, R. 68)

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stated that Pereira's divorce would be final on April 28th, but distribution of a property settlement of $48,000 would not occur until May 25th. An F. B. I. handwriting expert testified that the printing on the telegram blank was Pereira's (R. 102). Another Government witness, the operator of a telephone answering service in Fort Worth, identified petitioner Brading as a former customer who was known to the witness as E. J. Wilson (R. 108).

A vice president of the State National Bank at El Paso testified that Pereira had an account there, that a cashier's check payable to Pereira for $35,286.01 had been issued, and that the paying teller's stamp showed payment on June 19, 1951, the day petitioners had left Roswell in Mrs. Joyce's Cadillac (R. 94–99). A clerk in the same bank testified that Pereira came to his window and presented a check drawn on a California bank for about $35,000, that he had forwarded the check to Los Angeles for collection, that after payment by the Los Angeles bank he had issued a cashier's check to Pereira, and that the paying teller had asked him to identify Pereira, which he had done (R. 104–106). The bank vice president had testified earlier that the check had been forwarded to the Los Angeles Bank through the United States mails (R. 98–99).

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SUMMARY OF ARGUMENT

I

Petitioners' first contention is that the former wife of petitioner, Pereira, was improperly allowed to testify as to allegedly confidential communications made during their marriage. Under Rule 26 of the Federal Rules of Criminal Procedure, which provides that common law rules of evidence shall govern, the testimony was properly admitted because, (A) the communications were not, in fact confidential, (B) from the point of view of the husband asserting the privilege, the marriage was a sham, and (C) the communications, even if confidential, were offered in a criminal prosecution against the husband for an injury to his wife.

A. Since petitioner, Pereira, and the witness, Mrs. Joyce, were no longer married at the time of the trial, the rule against admitting the adverse testimony of a spouse is inapplicable. The claim that the testimony is to be barred, therefore, is based on the theory that it discloses a confidential communication made during the marriage, as to which the privilege against compulsory disclosure remains after the marriage. 8 Wigmore, *Evidence* (3d ed. 1940) § 2341. It is clear that the communications involved in this case were not in fact confidential. They related either (1) to matters which came to Mrs. Joyce's knowledge outside the marriage relationship, such as the

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source of certain checks, (2) to the acts of Mrs. Joyce or her then husband, Pereira, such as her passage of checks to him or his failure to return certain sums of money to her, which of course were not communications at all (cf. *United States* v. *Mitchell*, 137 F. 2d 1006, 1009 (C. A. 2)), certiorari denied, 321 U. S. 794, or (3) to matters as to which there was publication by Pereira himself, to Brading or others, or as to which such publication was reasonably to be expected, such as the various conversations between Pereira and Mrs. Joyce, some in private, some not, which related to the purchase by them of a hotel. To the extent that there is a small residuum of marital statements which were not revealed to outsiders, and not otherwise excepted from the privilege, we submit that they were so intimately connected with matters either already disclosed or fully expected to be, that any presumption of intended confidence disappears.

B. Although a marriage ceremony took place between Pereira and his former wife, Mrs. Joyce, on May 25, 1951, an examination of the events leading up to the marriage, as well as those of the three weeks of its life, show that the marriage was in fact merely a convenient tool used to expedite Pereira's getting, first, Mrs. Joyce's confidence, and then, her money. In these circumstances, the application of the privilege for marital confidences, designed to preserve domestic harmony, is singularly inappropriate. The recent holding of this Court in *Lutwak* v. *United States*,

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344 U. S. 604, requires a denial of the privilege here. This Court upheld the refusal to exclude testimony by wives against defendants whose marriages were shown to have been entered into only for the purpose of allowing them to enter the country under the War Brides Act, with the intention that the marriages be immediately thereafter dissolved. This Court reasoned that where "it is made to appear to the trial court * * * that the relationship was entered into * * * only for the purpose of using the marriage ceremony in a scheme to defraud * * * the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule." 344 U. S. at 614–615. Since the rule disqualifying a spouse from giving any testimony at all, and the privilege against disclosure of confidential communications, serve the same purpose, preservation of marriage relationships, the *Lutwak* holding as to the disqualification is clearly applicable here to preclude sustaining the privilege.

The principal difference between *Lutwak* and the present case, the fact that there both spouses were parties to the fraud whereas here only one was, is not important since the party claiming the privilege here is the dishonest husband.

This same result has been reached in cases holding that the juror's privilege against disclosure of what he said in the jury room and the client's privilege to talk confidentially with an attorney, are dissipated when the party claiming

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the privilege was trying to take advantage of his own fraud. Cf. *Clark* v. *United States,* 289 U. S. 1, and cases cited.

C. Even if the marriage is held a sufficient basis for the application of the privilege, and even if the communications themselves are held to be confidential, it was still not error for the trial court to admit Mrs. Joyce's proffered testimony. Even at common law, an exception was made to the application of this privilege where the spouse's testimony was offered in a criminal proceeding against a spouse for personal violence against the witness spouse. 8 Wigmore, *Evidence* (3d ed.) § 2338. There have been extensions for this exception to the privilege to include cases where one spouse is charged with any offense involving the person or property of the witness spouse. Certainly the privilege should not be applied when one spouse is charged with an injury to the property of the other in a case where the relationship at its opening rested on so plainly fraudulent a basis as did the Pereira-Joyce marriage.

II

Petitioners contend that there was no proof that they mailed or caused to be mailed the $35,000 check, as alleged in the indictment. But there can be no question that there was sufficient evidence which, if believed, conclusively established that Pereira deposited in an El Paso bank a check drawn on a Los Angeles bank for collec-

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tion and did not receive cash therefor until the inter-bank mailings had been completed. The testimony of the bank vice-president from the bank records, and the clerk who authorized the final payment to Pereira (R. 98–99, 104–106) completely establish this point. In any event, it is clear that this testimony establishes that the check moved in interstate commerce, at petitioners' instance, which is sufficient to sustain the sentence (since the concurrent sentence on the interstate transportation substantive count exceeded that imposed on the mail fraud substantive count).

III

Petitioners also contend that the imposition of a cumulative penalty on the conviction for conspiracy cannot be upheld because of an alleged identity between the substantive offenses which were jointly committed, and the offense of conspiring to commit these offenses. Their argument is that since the jointly committed substantive offenses are themselves conspiracies, there cannot be additional punishment imposed under the conspiracy statute.

But, as this Court has often pointed out, a conspiracy is a separate and distinct offense, "* * * a partnership in crime" with "* * * ingredients, as well as implications, distinct from the completion of the unlawful project." *Pinkerton* v. *United States,* 328 U. S. 640, 644. Consequently, except as to cases where two persons

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must necessarily agree in order to accomplish the substantive crime (see *United States* v. *Katz*, 271 U. S. 354), the addition of a conspiracy count is upheld. Neither using the mails to defraud nor the interstate transportation of stolen property necessarily involves the cooperation of two or more persons, and it has always been held that conspiracy counts added to indictments for those offenses were proper. E. g., *Mansfield* v. *United States*, 155 F. 2d 952 (C. A. 5), certiorari denied, 329 U. S. 792 (mail fraud plus conspiracy); *Carlson* v. *United States*, 187 F. 2d 366 (C. A. 10), certiorari denied, 341 U. S. 940.

IV

Petitioners contend that there was no evidence of any agreement to use the mails to defraud or to transport stolen property across state lines, in absence of which, the conspiracy count must fall. But there was evidence from which the jury could find that petitioners conspired to commit the substantive offenses charged in the indictment. It is not necessary that petitioners have agreed, in so many words, to use the mails or interstate commerce in their scheme to fleece Mrs. Joyce. As is true of any other conspiracy, liability depends on the scope of the agreement between the parties. The basic agreement here was obviously broader than the use of the mails. The record fully supports the conclusion that Pereira and Brading were engaged in a conspiracy to defraud

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Mrs. Joyce, and further, that when it became apparent, to both, that the final fruition of the scheme would have to await a check on a California bank, they continued in it with full recognition that the mails would in natural course be used to collect the check, and that it would certainly have to be transported across state lines.

ARGUMENT

I

TESTIMONY BY THE FORMER WIFE OF THE PETITIONER PEREIRA, WHICH ALLEGEDLY RELATED TO CONFIDENTIAL COMMUNICATIONS DURING COVERTURE, WAS PROPERLY ADMITTED AT THE TRIAL

Petitioners' first contention is that their convictions must be reversed because the trial court improperly permitted Mrs. Joyce, the principal government witness, and the former wife of the petitioner, Pereira, to testify as to allegedly confidential communications made during their marriage. The contention is without merit because (1) the communications involved in this case were not confidential, (2) from the point of view of the husband asserting the privilege, the marriage was a sham, and (3) the communications, even if confidential, were offered in a criminal prosecution against the husband for an injury to the wife.

There is no dispute that the admissibility of the testimony depends upon the application of Rule 26 of the Federal Rules of Criminal Pro-

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cedure which adopts "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." (*Supra,* p. 4.) Application of this rule clearly requires the admission of the contested evidence in this case.

A. THE COMMUNICATIONS INVOLVED IN THIS CASE WERE NOT CONFIDENTIAL WITHIN THE MEANING OF THE MARITAL CONFIDENCE PRIVILEGE

Since petitioner, Pereira, and the witness, Mrs. Joyce, were no longer married at the time of the trial (R. 10, 8), the rule against admitting any adverse testimony of a spouse is inapplicable. *Yoder* v. *United States,* 80 F. 2d 665 (C. A. 10); 8 Wigmore, *Evidence* (3d ed.) § 2237. The claim that the testimony should be barred, therefore, must be that it discloses a confidential communication made during the marriage, as to which the privilege against compulsory disclosure remains in force after termination of the marriage (8 Wigmore, *supra,* § 2341).

It is, however, not enough to warrant application of the marital confidence privilege that there was a communication between husband and wife. The privilege serves only to safeguard communications which the parties at the time intended should be kept secret. It follows from the basic purpose of the privilege, which Wigmore notes "is to insure subjectively the free and unrestrained privacy of communication, divested of any apprehension of compulsory disclosure

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* * *" (8 Wigmore, *Evidence* (3d ed.) § 2336) that "wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication." *Wolfle* v. *United States,* 291 U. S. 7, 14. While there is a presumption that privacy was intended, this presumption may be overcome (see *Blau* v. *United States,* 340 U. S. 332, 333), and is always overcome by "the *presence of a third person* within hearing" or "the *intended transmission* of the communication to a third person." 8 Wigmore, *supra,* § 2336; see also, e. g., *Wolfle* v. *United States, supra* (where this Court held that a letter from a husband to a wife which the former had dictated to a secretary did not come within the privilege).

The record in the instant case contains circumstances which clearly negative any implication of confidence between husband and wife. The matters as to which Mrs. Joyce testified either were (a) learned by her from sources other than her husband, (b) related to acts which did not constitute communications, or (c) referred to matters which had either been previously disclosed to others or as to which such disclosure was plainly contemplated.

Thus, the first of petitioner's objections (Pet. Br. 16) related to testimony that Mrs. Joyce had given Pereira a check for about $7,000—the proceeds of stock sold on her behalf; that Pereira

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was to use this money for the purchase of a Cadillac, which he had said would cost $4,750; that Pereira assured her they would settle later as to what was left after paying for the car; and that, in fact, he kept the change (R. 25–26).

No marital confidence was disclosed by this testimony. Clearly, it was to matter coming to her knowledge outside of the marriage relationship that Mrs. Joyce testified in stating the circumstances in which she received a check from her broker. Clearly it was to her own acts, not to communications, that she testified in stating that she subsequently transferred the same check to Pereira. Clearly, too, it was to an act, this time of Pereira, that Mrs. Joyce testified that he had failed to return to her the difference between the amount of the check and what he stated the car cost.[3] Finally, it is clear that Pereira himself published important aspects of the conversation to which this testimony related. For the check

[3] Although it is true that some courts have applied the privilege to acts, see *People* v. *Daghita*, 299 N. Y. 194, 86 N. E. 2d 172, and *Menefee* v. *Commonwealth*, 189 Va. 900, 55 S. E. 2d 9, cited by petitioners, the privilege is commonly accepted as applying to utterances only. 8 Wigmore, *supra*, § 2337; *United States* v. *Mitchell*, 137 F. 2d 1006, 1009 (C. A. 2), certiorari denied, 321 U. S. 794. But even if the privilege is applied to some acts, those acts should include an element of intentional communication. *Daghita* and *Menefee*, *supra*, involve hiding stolen goods in the presence of the wife, which obviously suggests an implicit injunction of silence. Nothing of this nature was involved either in Mrs. Joyce's passage of a check to Pereira, or in his failure to return the change after buying the car.

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used in payment for the car was drawn to the order of Mrs. Joyce, and shows on its back her endorsement, as well as that of Pereira and one Studna, from whom Pereira bought the car (R. 26–27).

No better showing of confidence can be made on petitioners' second objection which related to testimony concerning a conversation which took place between the Pereiras very shortly after their marriage (Pet. Br. 16). Mrs. Joyce was allowed to testify that Pereira had offered her an opportunity to go into a hotel venture; that she had accepted, and had indicated she would have her broker sell some securities to raise the money; that Pereira had then said he would see his broker, one E. J. Wilson, about the deal; and that after being gone all day, Pereira had returned and announced that the deal was all set, that he had gotten the hotel "for a song" (R. 29).

Again, if we consider the specific nature of these communications, it is plain that they were not confidential. Pereira and his wife were discussing a business venture which had already been discussed in considerable detail in the presence of Brading and Kathryn Joyner (R. 28). The very hotel in question had been visited by all four together, with a specific injunction by Pereira not to disclose their real interest in surveying the property (*Id.*). Since Pereira's intention to go into the hotel business had thus

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been made known to Brading and to Mrs. Joyce's half-sister, and since they had actually seen the hotel, it would have been perfectly reasonable for Mrs. Joyce to have discussed her proposed participation in the venture with either of them. Clearly, Pereira does not appear to have cautioned her against doing so, and, indeed, there is reason to suspect he would have welcomed her consulting Brading on the matter.[4] Furthermore, the business nature of the entire conversation implies disclosure of its substance to interested third parties, as, for example, to the brokers or bankers through whom financial arrangements would be made, and so negatives a presumption of secrecy. Thus, Pereira, himself, had stated that he was going to see E. J. Wilson, his broker, about the matter.

The inconsistency of such business relationships and the marital confidence privilege has been implicitly recognized by the courts (cf. *Dobbins* v. *United States,* 157 F. 2d 257, 260 (C. A. D. C.); *Kansas City Life Ins. Co.* v. *Jones,* 21 F. Supp. 159 (S. D. Calif.); see also *Schmied* v. *Frank,* 86 Ind. 250, 257; *Commonwealth* v. *Wilson,* 190 Ky. 813, 229 S. W. 60; *Poulson* v. *Stanley,* 122 Calif. 655, 55 Pac. 605; *Parkhurst* v. *Berdell,* 110 N. Y. 386; 18 N. E. 123; *Sackman* v. *Thomas,* 24 Wash. 660, 64 Pac. 819), and by state statutes which, at

[4] Mrs. Joyce's own reluctance to having Brading too fully acquainted with her affairs (R. 58–59) obviously only emphasizes this point.

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least in civil cases, explicitly exempt from the privilege (or from the husband-wife competency rule) transactions where one spouse acts for the other. *E. g.,* Arkansas Statutes Anno. (1947) § 28–601; Illinois Revised Statutes (1945) § 51–5. Cf. Anno., 4 A. L. R. 2d 835. These holdings and statutes are relevant here as an expression of "reason and experience" within the meaning of Rule 26.[5]

Moreover, the conventional standard that communications intended to be transmitted to third parties are unprivileged, which, as is pointed out above, forecloses the privilege even as to good faith business discussions, operates here with special force in the peculiar circumstances of this case. The record makes abundantly clear, as is shown in more detail below, pp. 51–53, that Brading was a close confederate of Pereira in devising and

[5] See *Brooks* v. *Brooks*, 357 Mo. 343, 350, 208 S. W. 2d 279, 283: "The conversations here involved relate primarily to business matters, not marital confidences * * *. The better reasoned cases are to the effect that in actions between a husband and wife involving property rights the rule excluding relevant conversations between them in the absence of third persons as confidential communications yields to the necessity of the situation for the prevention of injustice and they are competent witnesses respecting such conversations. This harmonizes with our present public policy of constituting a married woman a femme sole for the purpose of transacting business, contracting, suing, being sued et cetera * * * and recognizing her rights in her separate property, real and personal, including earnings * * *." See also *Appeal of Spitz*, 56 Conn. 184, 187, 14 Atl. 776, 777.

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carrying out a scheme to defraud Mrs. Joyce.[6] Whatever might normally be thought of the confidential nature of husband-wife business communications, there would seem to be no question here that Pereira's "business" with his wife was not regarded by him as confidential in any way with respect to Brading, and therefore not properly the basis for him to claim a privilege.

The remaining conversations may be judged, and disposed of, on essentially the same principles. The conversations are summarized in the petitioners' brief as follows (Pet. Br. 16–17):

> Over the same objection, she [Mrs. Joyce] was permitted to testify that her husband went to Fort Worth to see about the hotel, told her that he had obtained an option on it and that he had paid $2,500 down, and produced a purported option (R. 30). He told her that he had telephoned his lawyer and obtained $2,500, which he had used to make the down payment (R. 30). About June 15, her husband told her that he had telephoned Wilson's secretary, and received a telegram granting an extension of the option (R. 30–31). When the check from Fewel & Company arrived, they discussed their affairs and decided that they would bank the money in El Paso because she didn't want everybody

[6] See pp. 51–53, *infra*. Note, particularly, that Brading early prevailed upon Mrs. Joyce to loan Pereira $5,000, so that he would have funds to invest in some oil leases (R. 15–16).

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> in Roswell, her home town, to know about the deal (R. 31). Pereira told her that he was going to El Paso to sign some papers in liquidation of his prior divorce, and for which money was waiting for him in El Paso (R. 32). She delivered and indorsed the check to him (R. 32). On June 18, 1951, Pereira told her that he was going to leave early next morning and be back early that afternoon, and that he would pay her what he owed her the next day (R. 34–35).

The conversations thus relate partly to further dealings in connection with the alleged purchase of the hotel, which, as we have suggested, either required or reasonably contemplated disclosure to others of the various facts which Pereira reported to Mrs. Joyce; and partly to the fact that Mrs. Joyce received and endorsed over to Pereira a check for some $35,000, which, as we have suggested in connection with the Cadillac check, could not be negotiated without making plain the most damaging fact as to which it was relevant, i. e., that Mrs. Joyce had got the money and turned it over to Pereira. The only other important testimony was that Pereira told her on June 18 that his June 19 trip would be a short one; but this could not have been confidential since the substance of the conversation was repeated the following morning in the presence of Brading (R. 34–35). It is thus clear that the major showing for which this third group of conversations was relevant: the check, its cashing, and

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the leaving, which, in concert create the most serious suspicion of Pereira's original intentions, are shown by testimony as to which there is no legitimate claim of privilege.

Finally, it is submitted that to the extent there may be a small residuum of marital statements in any of these three groups of conversations, which were not revealed to outsiders, they were so intimately connected with matter, either already disclosed or fully expected to be, that any presumption of intended confidence disappears. In this regard the situation is strikingly similar to that found by the Court of Appeals for the Second Circuit in *United States* v. *Mitchell,* 137 F. 2d 1006, 1009 (C. A. 2), certiorari denied, 321 U. S. 794, where the court declared:

> * * * In view of all that is thus admissible, what would be left is of very minor importance, hardly distinguishable from what is to be admitted. And we feel quite clear that under the circumstances whatever defendant said to her was not intended to be confidential and does not come within the privilege. * * * On her testimony he made no bones about issuing his directions for her work of prostitution in the presence of others; and it is the merest chance, not the nature of the communications or his desire to keep them confidential, which finds certain of his orders to her made to her alone.

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B. THE PRIVILEGE IS INAPPLICABLE WHERE THE ONLY PURPOSE OF THE MARRIAGE FOR THE HUSBAND CLAIMING THE PRIVILEGE WAS TO DEFRAUD HIS WIFE

Even if the communications involved in this case had been confidential, their admission in the trial court would still have been a proper application of the principles underlying the marital confidence privilege.

On May 25, 1951, a marriage ceremony took place involving Pereira and the witness (R. 10, 24). This followed a five-week courtship during which Pereira had managed, with the help of petitioner Brading, to get some $13,000 out of the witness on various pretexts (R. 16, 18, 24, 35). Within two or three days after the marriage, Pereira, with the further help of Brading, ostensibly initiated negotiations for the purchase of a hotel (R. 29), a venture which had been discussed by Pereira and Brading in the witness' presence even before the marriage (R. 23); and on May 28, 1951, Pereira proposed that Mrs. Joyce go in with him on the fictitious deal (R. 29).[7] On June

[7] At the time of this proposal, Pereira told Mrs. Joyce that he had to contact his broker, one E. J. Wilson, of Fort Worth, Texas (R. 29). The record shows that Brading had, on May 22, paid for a phone answering service in Fort Worth, which had been engaged by phone call from Dallas the day before (R. 107), and that in making payment, Brading had identified himself as E. J. Wilson (R. 108). The record also shows that about May 15, the two petitioners, Brading and Pereira, together with Mrs. Joyce had spent several days in Dallas; and that shortly after that Pereira and Mrs. Joyce went to Hot Springs, Arkansas, and decided to get married, which they did on May 25 (R. 22). Since Brading's registration

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15, 1951, less than three weeks after the marriage, and following what were obviously further efforts by the petitioners to convince Mrs. Joyce that the deal was real (R. 30–31), she endorsed over to Pereira a check for more than $35,000 (R. 32). Four days later, on June 19, 1951, Pereira received payment for the check, whereupon he departed with Brading in a Cadillac which he had bought with Mrs. Joyce's money two days after their marriage, and was not seen again by her until the trial (R. 35). Thus, from beginning to end, this purported marriage was nothing but a step in a scheme to defraud on the part of the one who now seeks to invoke the privilege.

"Reason and experience," which guide the federal courts in their application of common law evidentiary privileges (Rule 26, F. R. Crim. P., *Wolfle* v. *United States,* 291 U. S. 7, 12) plainly militate against invocation of the privilege in these circumstances. This Court, in *Lutwak* v. *United States,* 344 U. S. 604, recently held in similar circumstances that where "it is made to appear to the trial court * * * that the relationship was entered into * * * only for the purpose of using the marriage ceremony in a scheme to defraud * * * the reason for the [common law]

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as "Wilson" with the telephone answering service could only have been for a fraudulent purpose, and since, in fact, the device later proved useful in defrauding Mrs. Joyce, the inference is inescapable that the intent to defraud Mrs. Joyce preceded the supposed "marriage."

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ule disqualifying a spouse from giving testimony isappears, and with it the rule," 344 U. S. at 14–615. The Court noted, in so holding that it as not concerned with the validity or invalidity f the marriage, but merely with the question of hether a common-law principle of evidence hould apply. Since both the rule prohibiting estimony by one spouse against the other and he privilege with which we are concerned serve he same end, preservation of the marriage rela-ionship (*Wolfle* v. *United States, supra,* 291 J. S. at 14; 8 Wigmore, *supra* §§ 2332, 2333), what his Court said in the *Lutwak* case ought to be, in principle, controlling here.

It is true that in *Lutwak* the purpose of the marriage ceremonies was known to all partici-pants, whereas here Mrs. Joyce entered into the marriage in good faith. But here, as in *Lutwak,* t is not necessary to decide the general validity f the marriage. For the purpose of deciding hether the common law exclusionary rule should pply in his favor, it is enough that from Pereira's standpoint the marriage was a sham rom beginning to end. While, admittedly, the act that a marriage ends badly should not fore-lose the privilege as to confidential communica-ions made during an earlier more hopeful phase, hat clearly is not this case. Here, insofar as Pereira is concerned, the marriage was, as in *Lutwak,* merely a significant step in a scheme to

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defraud.[8] This was plainly not a marital relationship whose "sanctity and tranquility" (344 U. S. at 615) society has an interest in preserving. Rather, the interest of society would appear to lie on the other side, so as to favor exposure of those who use the form of marriage to achieve selfish and nefarious ends, particularly since the privilege, in any event, is an exception to the more general interest in making available all the data relevant to any specific controversy.[9]

Nor is it unusual to deny a privilege to one who seeks to use it to abuse the relationship which the privilege was designed to protect. This court held in *Clark* v. *United States*, 289 U. S. 1, that a juror who had, on her *voir dire* examination, deliberately failed to disclose facts on the basis of which her bias might have been inferred

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[8] It is a *difference* between *Lutwak* and the present case, that, in *Lutwak*, it was necessary for the jury to find that the marriages were intended to be shams in order to find the defendants guilty of the crimes charged, whereas there could, in the present case, be a finding of the substantive violation, without the conclusion by the jury that the marriage was intended *merely* to be a form to aid in the fraud. However, we do not regard the difference as a significant one in deciding whether the privilege should be applicable. The evidentiary ruling is one of competence, within the province of the judge alone, particularly since it does not coincide with the ultimate issue in the case. Cf. Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165.

[9] "The privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence cannot otherwise reasonably be preserved." *Wolfle* v. *United States*, 291 U. S. 7, 17.

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could not invoke the privilege normally available of keeping jury deliberations confidential. Mr. Justice Cardozo, for the Court, stated, *inter alia* (289 U. S. at 13–14):

> Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. * * * The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth.

The Court in the *Clark* case, moreover, recognized a similar kind of approach to the lawyer-client privilege as a relevant analogy, pointing out that a "client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." 289 U. S. at 15; *semble, O'Rourke* v *Darbishire,* [1920] A. C. 581, 604; 8 Wigmore, *supra,* §§ 2298, 2299.

The *Clark* case does not undertake, nor do we, any attempt to compare the relative importance of the various privileges. That is not relevant. What is relevant is that it is absurd to sustain a privilege, any privilege, in behalf of one who

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has fraudulently brought himself within the area in which the privilege normally operates. Compare American Law Institute, *Model Code of Evidence,* Rules 212, 217, 222. That principle, of which *Lutwak* is only a recent and especially compelling expression, is controlling in the present case.[10]

C. THE PRIVILEGE MAY NOT BE CLAIMED WHERE THE PURPOSE OF THE PROPOSED TESTIMONY IS TO PROVE AN INJURY BY THE DEFENDANT TO THE WITNESS

Even assuming that the Pereira-Joyce marriage must be treated as a valid basis for the

[10] No complaint can be made at this time of the trial judge's failure to make an explicit ruling that the marriage was a sham before admitting Mrs. Joyce's testimony relating to allegedly confidential communications. There was a sufficient basis on the record at the time of this testimony for such a ruling. The challenged conversations relate to certain events after the marriage ceremony of May 25, but before Mrs. Joyce's testimony got to that point, she had already testified to Pereira's whirlwind romance with her, his groundwork statements about his hotel business, his divorce (R. 13), and the fact that he was to get a settlement later of about $48,000 (R. 15, 17). She had already testified that Brading had induced her to lend $5,000 to Pereira on a representation that Pereira would otherwise lose out on a profitable oil deal (R. 15–16); that Pereira had later borrowed another $1,000 from her, for expenses (R. 17–18); that he had told her he had given two hotels to his first wife, Ada (R. 22); that Brading and Pereira had discussed Pereira's need for the steady income a hotel would produce in her presence (R. 23); and that Pereira was trying to pressure her into buying a Cadillac with her money (R. 23–24). This was sufficient. Compare *United States* v. *Graham*, 87 F. Supp. 237 (E. D. Mich.). In any event, since on the whole record there is no doubt about the purpose of this marriage, there is no occasion for reversal.

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privilege, and that some of the communications in issue in this case must be regarded as in fact confidential, it was still proper for the Court to admit the contested testimony. These communications fall within a well-recognized exception to the application of the privilege for cases in which the testifying spouse has been wronged by the other.

Such an exception clearly existed at common law,[11] both with respect to the rule prohibiting any testimony by one spouse against the other and, later, with respect to the rule prohibiting privileged communications during marriage (8 Wigmore, § 2338), although there is some indication that it was at first limited to cases involving prosecution for a personal injury to the spouse. See *Bassett* v. *United States,* 137 U. S. 496, 506; *State* v. *Kephart,* 56 Wash. 561, 562–563, 106 Pac. 165; *Overton* v. *State,* 43 Tex. 616. Courts of Appeals in a number of federal judicial circuits, however, have invoked that exception in order that a wife who had been forced into immoral activities by her husband might be *competent* to testify generally against him. *Denning* v. *United States,* 247 Fed. 463 (C. A. 5); *Pappas* v. *United States,* 241 Fed. 665 (C. A. 9); *Cohen* v. *United States,* 214 Fed. 23 (C. A. 9), certiorari denied, 235

[11] It is said to date from *Lord Audley's Case*, decided in 1631, Hutt. Rep. 115, 3 How. St. Tr. 401, where the husband had instigated rape against his wife. The exception was put on the ground of the necessity of using the wife's testimony.

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U. S. 696; *United States* v. *Mitchell,* 137 F. 2d 1006 (C. A. 2), certiorari denied, 321 U. S. 794; *Hayes* v. *United States,* 168 F. 2d 996 (C. A. 10). It has made no difference in those cases that theoretically the offense is "not a crime against the person of the wife, but a crime against interstate commerce" *United States* v. *Mitchell, supra,* at 1008. And in *United States* v. *Graham,* 87 F. Supp. 237 (E. D. Mich.), a wife was held to be competent to testify against her husband, where, as here, he was on trial for transporting in interstate commerce a sum of money taken from her by fraud.

While no federal cases have been found expressly ruling on the point, "reason and experience" dictate that the exception should apply equally to the marital confidence privilege. Wigmore's assertion that at common law the marital confidence privilege as well as the incompetency rule were subject to exception in the case of injuries done by one to the other seems to be based in part on the logic and purposes of the two rules. 8 Wigmore, *supra,* § 2338; see also *State* v. *Kephart, supra.* While he cites no common law cases, Wigmore notes several state cases decided under statutes that allow, either expressly or by construction, the wife's testimony as to conversations with her husband where she had been victimized by him. *Jordan* v. *State,* 142 Ind. 422, 424, 41 N. E. 817; *Rice* v. *Waddill,* 168 Mo. 99, 67 S. W. 605; see also *Beyerline* v. *State,* 147 Ind. 125, 133, 45 N. E. 772. It is patent, moreover,

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that the "necessity" which justifies the acceptance of testimony by one spouse against the other (see 8 Wigmore, *supra,* § 2239, and cases cited, n. 1), applies equally to the privilege. The injustice of allowing the perpetrator of a crime to go unpunished because of the enforced silence of the aggrieved spouse, who will often be the only witness thereto, is manifest, and would be vividly exemplified were the present petitioners to be relieved from their wrong on this ground.

The lack of reason for the privilege in circumstances like those here presented was recognized by the American Law Institute in its *Model Code of Evidence,* which eliminated the incompetency rule but provided for a confidential communications privilege (Rule 215). The Code specifically provided that the privilege should not apply in a criminal action in which one of them is charged with "a crime against the person or property of the other * * *" (Rule 216 (c) (i)). A recommendation for a similar provision excepting from the marital confidence privilege prosecutions for crimes "arising out of an alleged injury or threatened or attempted injury to the person or property of either spouse * * *" was made to the Massachusetts legislature by the Judicial Council of that state. See Twenty-Second Report of the Judicial Council of Massachusetts for the year 1946, 32 Mass. Law Quarterly, No. 1, pp. 69, 75. A statute of similar effect is operative in Illinois. Ill. Rev. Statutes (1945), ch. 38, sec. 734.

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There are, moreover, statutes in some fourteen states [12] which except from the operation of the marital confidence privilege cases in which the defendant spouse is accused of a crime against the testifying spouse; and, while there is some support for the view that this covers only charges of physical violence against the spouse (see *State* v. *Kephart,* 56 Wash. 561, 106 Pac. 165; *Bassett* v. *United States,* 137 U. S. 496 (construing Utah statute)), there is also support for what we believe to be the more correct view that this covers property offenses against the spouse as well. See *Emerick* v. *People,* 110 Colo. 572, 136 P. 2d 668, and *O'Loughlin* v. *People,* 90 Colo. 368, 10 P. 2d 543.

Indeed, the exception has been recognized by the United States Court of Appeals for the Second Circuit in a case on which petitioners mistakenly reply. In *United States* v. *Walker,* 176 F. 2d 564 (C. A. 2), certiorari denied, 338 U. S. 891, the court recognized this exception but

[12] Arizona Code Anno. (1939), § 44–2702; California Code of Civil Procedure (Deering, 1949), § 1881; Colorado Statutes Anno. (1935), Chapter 177, § 9; Idaho Code (1947), § 9–203; Minnesota Statutes Anno. (1947), § 595.02 (1); Montana Revised Codes Anno. (1947), § 93–701–4; Nevada Compiled Laws (1929), § 8971; North Carolina General Statutes (1943), § 8–57; North Dakota Revised Code of 1943, § 31–0102; Oregon Compiled Laws Anno. (1940), § 3–104; South Dakota, Code (1939), § 36.0101; Utah Code Anno. (1953), § 78–24–8; Washington (Remington's Revised Statute, 1931), § 1214; Wyoming Compiled Statutes (1945), ch. 3, § 2605.

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found it inapplicable for reasons not pertinent to this case. The court stated (176 F. 2d at 568):

> We do not forget that a wife from the earliest times was competent to testify against her husband, when the crime was an offense against her person; and we have ourselves extended the exception to the crime of transporting her as a prostitute in interstate commerce * * *. The same exception probably extends to the privilege against the admission of confidential communications. The case at bar is not, however, within this exception for Clara Duer Walker [the wife] was not the victim of the frauds for which the defendant was being tried.

Here, on the other hand, the wife was herself the victim of the fraud, and could, therefore, testify in connection with the injury done her.

In principle, it is submitted, that those states which have, legislatively or judicially, ruled that one who defrauds his spouse may not claim the marital confidence privilege, are correctly applying the common law with guidance from reason and experience. It is an obvious abuse of the marriage relationship to defraud a spouse. It is almost certain to be the case in any such situation that the defrauding spouse will have preyed on the trust built into the marriage to accomplish his purpose. It serves no purpose to stand guard over a marriage whose foundations have been thus corrupted; and there is no reason

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why the federal courts committed to the standard of reason and experience, set in the flexible tradition of the common law, cannot say as much.

It may be that a court would be reluctant to take this view if faced with a marriage of long tenure. But here there is no such problem. The record clearly shows that the marriage itself was merely a convenient device to hasten the fleecing of Mrs. Joyce. Therefore, even if this Court should determine that, as a general proposition, a husband's fraud against his wife does not justify an exception to the marital confidence privilege, still, it should hold that it does so when it appears that the husband's fraud pervades the marriage at its inception, and where within a few weeks, the fraud accomplished, the marriage ended. Compare American Law Institute, *Model Code of Evidence,* Rule 217; *Fraser* v. *United States,* 145 F. 2d 139, 143–144 (C. A. 6), certiorari denied, 324 U. S. 849.

II

THERE WAS SUFFICIENT PROOF OF THE USE OF THE MAILS AND OF INTERSTATE COMMERCE TO SUPPORT THE CONVICTIONS FOR THE SUBSTANTIVE OFFENSES

Petitioners contend that their convictions must be reversed because there was no proof that they mailed, or caused to be mailed,[13] the $35,000

[13] Under Section 2 of the Criminal Code (18 U. S. C., Supp. V, 2) a person who "wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

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check, as alleged in the indictment (Pet. Br. 29–32).

Evidence which, if believed, established conclusively that Pereira deposited a check for collection and that this check was, in fact, sent through the mails, was provided by the testimony of the Vice President of the State National Bank of El Paso, who appeared as a witness for the Government and testified as follows (R. 98–99):

> **Q.** Does your record show what your bank did with this instrument [the check for $35,000 endorsed to Pereira by Mrs. Joyce] when it was deposited there for collection?
>
> A. Yes. The item was presented to us on June 15th for collection, entered for collection on that date. We sent direct to the head office of the Citizens National Bank, where the check was drawn on, by mail.
>
> The COURT. Citizens National Bank where?
>
> The WITNESS. Los Angeles.
>
> * * * * *
>
> A. With instructions to wire fate. * * * That means * * * to wire us if the item is paid or if it is not, to wire us in either event.
>
> The COURT. But you sent the check through the United States mail?
>
> The WITNESS. Yes, sir.
>
> The COURT. To this bank in Los Angeles, California?
>
> The WITNESS. That is correct.

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A. Wire advice of payment was received June 16th, stating that this check had been paid and they were crediting our account with the proceeds.

Q. Then on June 19th you gave Victor Pereira that amount of money?

A. That is correct, yes, sir.

Thereafter, a clerk of the bank at El Paso testified that Pereira was the man who had presented a check drawn on a Los Angeles bank for collection, that later on when the item came back from Los Angeles he had issued a cashier's check to Pereira, and that he had identified Pereira for the paying teller at the time Pereira cashed the cashier's check (R. 104–106).

Although the testimony does not show, in so many words, that either of these witnesses personally deposited the check in the mails, it is clear that the records of the bank, including a copy of the letter of transmittal which accompanied the check, showed that the check had been mailed in regular course (R. 98–100), and that a response had come to the bank's request to "wire fate". This was sufficient. See *United States* v. *Leathers*, 135 F. 2d 507, 510 (C. A. 2).[14]

[14] The *Leathers* case distinguished the cases on which petitioners rely, on the ground that in both, *Mackett* v. *United States*, 90 F. 2d 462, 464–65 (C. A. 7), and *United States* v. *Baker*, 50 F. 2d 122, 123 (C. A. 2), substantially all the proof of the mailing was the fact that two different cities, or banks in two different cities, were involved, and the normal inference that the letters or checks were sent by mail from one to

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But, it is clear in any event that the sufficiency of the proof of mailing is unimportant. For purposes of affirming the judgments below, it is not necessary to sustain the five year sentences imposed for the mail fraud violations, since concurrent ten year sentences were imposed for having caused property obtained by fraud to be transported in interstate commerce. See *Hirabayashi* v. *United States,* 320 U. S. 81, 85; *Pinkerton* v. *United States,* 328 U. S. 640, 641–642, fn. 1. Proof of the latter offenses depends only on an interstate transportation, of whatever sort, mails or otherwise. For this, the fact alone that the check, which had to be transported to Los Angeles before it could be honored, was in fact cashed in El Paso is sufficient.[15]

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the other. There was no testimony in either case which eliminated the possibility that the checks might have been delivered by hand.

[15] Petitioners do not contend that, even if the mailing was satisfactorily proved, there were still no substantive violations of the mail fraud and stolen property statutes, for the reason that they personally did not actually deposit the check in the mail. It is clear that such a contention, were it made, could not be sustained. Thus, since fruition of the scheme depended upon completion of the collection process, it is clear that the mail fraud statute was violated by the bank mailing. See *Kann* v. *United States*, 323 U. S. 88, 94, and cases cited, fn. 7. Likewise, the check was an article obtained by fraud within the meaning of 18 U. S. C. (Supp. V) 2315, and the transportation procured by depositing it for collection is an offense under that statute. See *United States* v. *Sheridan*, 329 U. S. 379.

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III

PETITIONERS' CONVICTIONS FOR THE SUBSTANTIVE OFFENSES CHARGED AGAINST THEM, FOLLOWED BY A CUMULATIVE SENTENCE ON THE CONSPIRACY COUNT, DO NOT CONSTITUTE DOUBLE JEOPARDY

Petitioners also contend that their convictions must be reversed as to the conspiracy count because of an alleged identity between the substantive offenses, which were jointly committed, and the conspiracy to commit those offenses. Their argument is that the jointly committed substantive offenses were, in essence, conspiracies; and that therefore, there cannot be additional punishment imposed under the conspiracy statutes. (Pet. Br. 24–26.)

It is true that both petitioners were convicted of committing the substantive offenses charged in counts one and ten of the indictment, but it by no means follows that the additional punishment imposed under count eleven, the conspiracy count, was for the same offenses. The fact that two persons are convicted of committing the same substantive offense, does not mean that they were convicted of conspiring to commit that offense. The conspiracy is distinct from the crime which is its object. As this Court said in *Pinkerton* v. *United States,* 328 U. S. 640, 644:

> A conspiracy is a partnership in crime. * * * It has ingredients, as well as implications, distinct from the completion of the unlawful project.

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It is true that where two persons must necessarily agree in order to accomplish the substantive crime, it is improper to add a conspiracy count, since all of the elements of a conspiracy are present in the completed substantive crime (*United States* v. *Katz,* 271 U. S. 354), but neither using the mails in a scheme to defraud nor the interstate transportation of stolen property necessarily involves the cooperation of two or more persons. Cf. *United States* v. *Zeuli,* 137 F. 2d 845 (C. A. 2).

The basic test to be applied in determining whether one series of acts may be punished as two offenses is whether each offense requires the proof of a fact which is not essential to the other. *Blockburger* v. *United States,* 284 U. S. 299. That different elements are involved in a substantive violation of the mail fraud statute and in a conspiracy to violate it, is particularly clear. It is enough to establish the substantive mail fraud offense against Pereira that he caused the check to be mailed in the execution of a scheme to defraud. To sustain Brading's conviction of this same substantive offense, it is only necessary that the mailing was in fact within Pereira's authority to carry out the joint criminal enterprise. *Pinkerton* v. *United States,* 328 U. S. 640; *Hart* v. *United States,* 112 F. 2d 128 (C. A. 5); *Baker* v. *United States,* 115 F. 2d 533, 540 (C. A. 8); *Steiner* v. *United States,* 134 F. 2d 931 (C. A. 5), certiorari denied, 319 U. S. 774; *Weiss* v. *United*

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States, 120 F. 2d 472 (C. A. 5). It is not necessary for this purpose to show any agreement to use the mails, although if in fact there was such an understanding, which we show below was actually the case, pp. 51–53, the conclusion that there was authority for Pereira to send the check to Los Angeles was valid, *a fortiori.*

On the other hand, with respect to the conspiracy count, such an agreement is the essence of the offense. To establish it, circumstances must be shown from which can be inferred not only an intent to defraud, but an intent to make use of the mails in executing the fraud. *Farmer* v. *United States,* 223 Fed. 903, 907 (C. A. 2); *Preeman* v. *United States,* 244 Fed. 1, 17–18 (C. A. 7), certiorari denied, 245 U. S. 654. For this purpose, of course, it is irrelevant that the mails actually were used, save as the actual events tend to show that there was an agreement involving use of the mails.

Since different elements are thus involved, it has consistently been held that a charge of conspiracy to violate the mail fraud statute survives a failure to prove substantive counts brought under that statute (*Mackett* v. *United States,* 90 F. 2d 462 (C. A. 7); *Morris* v. *United States,* 7 F. 2d 785 (C. A. 8)) and convictions under indictments charging violation of both the mail fraud and the conspiracy statutes have consistently been upheld by Courts of Appeals. *Mansfield* v. *United States,* 155 F. 2d 952 (C. A. 5),

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certiorari denied, 329 U. S. 792; *Blue* v. *United States,* 138 F. 2d 351 (C. A. 6), certiorari denied, 322 U. S. 736; *United States* v. *Leathers,* 135 F. 2d 507 (C. A. 2); *United States* v. *Bender,* 60 F. 2d 56 (C. A. 2).

On essentially the same reasoning, it is equally clear that different elements are involved in a substantive violation of the statute prohibiting interstate transportation of stolen goods and in a conspiracy to violate that statute. Thus, both petitioners can be convicted for violation of the substantive statute without showing more than that Pereira knowingly presented the check for collection through interstate commerce, and that this was within the scope of his general authority to carry out the joint criminal enterprise, whereas, "the gist of the charge of conspiracy was not the transportation but the unlawful plan and agreement of the conspirators." *Allen* v. *United States,* 89 F. 2d 954, 955 (C. A. 4); see also *Carlson* v. *United States,* 187 F. 2d 366 (C. A. 10), certiorari denied, 341 U. S. 940.

IV

THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S FINDING THAT THE PETITIONERS CONSPIRED TO COMMIT THE SUBSTANTIVE OFFENSES CHARGED IN THE INDICTMENT

Petitioners' final contention is that there was no evidence of any agreement to use the mails to defraud or to transport stolen property across

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state lines, in absence of which, of course, th
conspiracy count must fall. The record, viewe
against the standards established in conspirac
cases for showing the existence of intention t
use the mails to defraud,[16] refutes this contentio

Proof of the conspiracy count, unlike the sub
stantive counts, requires evidence from which th
jury might reasonably infer an agreement to us
the mails in executing the fraud. But in applyin
this standard, it has to be remembered that i
very few conspiracies is the use of the mai
explicitly agreed to. People conspire to defrau
other people by techniques and in circumstance
where the use of the mails is, in greater or lesse
degree, implicit. The question is whether th
basic scheme shows sufficiently that a mailing
reasonably necessary to complete the scheme, s
as to make it fair to say that the conspirator
agreed upon the use of the mails. Obviously, th
is sometimes clear from the beginning of th
venture, and sometimes becomes clear only a
the venture proceeds. For, just as conspiracie
grow, as people are added to them, so the detaile
acts to be performed to accomplish a venture ma
be added to or changed as the circumstances i
which the fraud must be executed change. C

[16] The conspiracy count is established if petitioners a
shown to have agreed to commit either of the substanti
offenses charged, since a conspiracy to commit a multiplici
of offenses is no different in legal effect from a conspira
to commit a single offense. Cf. *Braverman* v. *United State*
317 U. S. 49.

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Blumenthal v. *United States,* 332 U. S. 535. The basic requirement was expressed by the Court of Appeals for the Second Circuit in *Farmer* v. *United States,* 223 Fed. 903, at 907, as follows:

> When * * * the charge is conspiracy to commit the offense specified in section 215, it is necessary to prove an intent, not only to defraud, but also to defraud by the use of the mails.

And the limitation was also stated that (*id.*):

> Direct evidence of intent is rarely available; it may be shown by circumstances. Usually when the scheme is unfolded it is apparent that it could not be carried out without using the mails, and a jury is therefore warranted, without further proof, in drawing the inference that those who devised the scheme intended to use the mails.[17]

See *Blue* v. *United States,* 138 F. 2d 351, 360 (C. A. 6). In this respect, mail fraud conspiracies are no different from other conspiracies, which, as this Court has remarked, "may be found in a course of dealing or other circum-

[17] While the court failed to find that use of the mails was contemplated, since the scheme was one which relied primarily on personal representations as to the worth of supposedly rare books, payment was by check, and it would appear probable that bank mailings would have been required before the full fruits of the fraud could be realized. However, the court appears to have assumed that the scheme ended with receipt of the check, and it did not consider the effect of mailings procured thereafter by depositing the check, if, in fact, there was such.

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stances as well as in an exchange of words * * *." *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809–810. See *Glasser* v. *United States,* 315 U. S. 60, 80, where this Court observed that "a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *United States* v. *Manton,* 107 F. 2d 834, 839 (C. A. 2).

In mail fraud cases such circumstances are most obviously present when the scheme to defraud is one which could not be carried out without the mails. Thus, for example, the maintenance of a large office force may give notice to all who participate in the scheme that the mails will be used *Blue* v. *United States, supra.* Similarly, where the essence of the scheme is the solicitation by mail prospective purchasers of fraudulent securities, it can be inferred that "all who took part understood that the mails would be used in the course of the scheme." *United States* v. *Cohen,* 145 F. 2d 82, 91 (C. A. 2), certiorari denied 323 U. S. 799. See also *Preeman* v. *United States,* 244 Fed. 1 (C. A. 7); *Ader* v. *United States,* 284 Fed. 13 (C. A. 7); *Morris* v. *United States,* 7 F. 2d 785 (C. A. 8); *Stephens* v. *United States,* 41 F. 2d 440 (C. A. 9).

Such an understanding may also exist where, as here, the scheme does not contemplate correspondence among the conspirators or from them to their intended victims, but involves the mailing of checks for collection by the banks at which they were deposited by the defrauders, since collec-

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tion by the banks was necessary to allow the defrauders to get the money and complete the frauds. *Spear* v. *United States,* 228 Fed. 485 (C. A. 8); *Goodman* v. *United States,* 97 F. 2d 197 (C. A. 3). See, *United States* v. *Leathers,* 135 F. 2d 507 (C. A. 2), where the fraud was carried out without using the mails by means of false representations as to the value of certain oil leases. The victim, Miss Bayer, at various times paid the appellants substantial sums of money, a part of which was in the form of checks drawn on several New York banks, which were deposited for collection at banks in Springfield, Illinois, and were forwarded by mail to the drawee banks in New York. The appellants were charged with three substantive offenses against the mail fraud statute, and with conspiring "to commit the frauds set forth * * * through the use of the mails" (135 F. 2d at 509). The Court of Appeals in affirming the convictions on both the substantive and conspiracy counts, noted that "Everyone knows that checks sent by banks from distant parts of the country are almost invariably forwarded by mail" (135 F. 2d at 510). In addition, there was testimony by bank officials that, in fact, the mails had been used.

The *Leathers* case seems clearly to hold that a conspiracy to defraud will be converted into a conspiracy to defraud by use of the mails upon receipt from the victim of a check drawn upon an out-of-town bank. This is an entirely reason-

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able result, for, as is well-settled, those depositing such a check for collection may be found to know that the mails will be used (see *Kann* v. *United States,* 323 U. S. 88, 94; *Goodman* v. *United States,* 97 F. 2d 197, 199 (C. A. 3)), and, of course, to know also that full execution of the fraud requires that this be done. The fact that only one of the conspirators actually presents the check is not decisive, if there is evidence from which it can be inferred that the other participants knew or had reason to believe that the victim would pay by means of an out-of-town check. When payment by such a check is made or expected to be made, all who continue with the scheme to defraud with such knowledge clearly anticipate that the mails will be used in the course of collection. The scheme to defraud then becomes one which necessarily will involve the mails in its execution, and all who participate therein may be found guilty of conspiring to violate the mail fraud statute.

We think it clear that in the present case there was evidence from which the jury could have found that both conspirators knew sooner or later that an out-of-town check was involved and that its collection would involve use of the mails. While initially it may not have been apparent to petitioners that recourse to the mails would be required, this, as we have stated, is not controlling. The jury could, and did, find that at some time

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prior to the actual mailing of the check for collection petitioners both had reason to believe that such a mailing was indispensable to fruition of the scheme.

There was an abundance of evidence from which the jury could and did infer that Brading and Pereira were in close and continued association throughout the duration of the fraudulent scheme. Brading was the one who first met Mrs. Joyce and introduced her to Pereira (R. 12). He accompanied Pereira and Mrs. Joyce during all the early phases of the "courtship"; and was always close at hand during the various trips taken by Mrs. Joyce and Pereira before the marriage.[18] Less

[18] Brading went with Pereira and Mrs. Joyce on their first trip to Mrs. Joyce's home in Roswell, New Mexico (R. 14). Shortly thereafter, when Mrs. Joyce and Pereira went back to El Paso, Texas, Brading turned up there, much to Mrs. Joyce's surprise (R. 17); after which they all had a social evening in Juarez, Mexico, and then went back to Roswell together (*Id.*). Mrs. Joyce and Pereira shortly thereafter went on a trip together, stopping first at Wichita Falls, Texas, and Brading showed up there (R. 19). Brading thereafter drove with Pereira and Mrs. Joyce to Dallas, Texas (R. 22). Mrs. Joyce and Pereira then drove to Hot Springs, Arkansas, where they decided to get married, and almost immediately after the decision was made, Brading showed up, this time, ostensibly, as a result of a phone call from Pereira (R. 23). As Pereira and Mrs. Joyce had decided to get married in Kansas City, Missouri, and to buy a new Cadillac there from a friend of Pereira's, with Mrs. Joyce's money (R. 24), Brading drove Mrs. Joyce's car back to Roswell, New Mexico, and then joined Pereira and Mrs. Joyce, who had flown to Kansas City, in time for their wedding there (R. 25).

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than ten days after first meeting Mrs. Joyce, Brading induced her to loan Pereira $5,000 to invest in some promising oil leases (R. 16). After the wedding he was present when Pereira began talking about making the hotel deal, and in Mrs. Joyce's presence he and Pereira "discussed it pro and con" (R. 28).[19] Brading, it developed at the trial, was the "E. J. Wilson" whom Pereira had called in order to get an extension while waiting for Mrs. Joyce's check to arrive from California, and who ostensibly sent a telegram granting the extension (R. 31, 83, 108).[20] Shortly after the check arrived and was deposited for collection by Pereira, Brading rejoined the Pereiras and stayed as a guest in their home (R. 34). On June 19th, Brading and Pereira left Mrs. Joyce's home in Roswell, New Mexico, together, ostensibly to pick up some oil leases (R. 35). That was the day on which pay-

[19] Mrs. Joyce testified of this period, with perhaps a trace of exasperation, that Brading "was usually around some place" (R. 28).

[20] Moreover, the record shows that the phone service arrangement set up in the name of E. J. Wilson was set up by a phone call from Dallas on May 21, which was very shortly after Pereira, Mrs. Joyce and Pereira had all been in Dallas together, and just about the time that Mrs. Joyce and Pereira had got to Hot Springs, Arkansas, where Pereira and Mrs. Joyce decided to get married (R. 23). The inference is unavoidable that the decision to use the marriage and "E. J. Wilson" to give authenticity to the fleecing arrangement was discussed at Dallas by Brading and Pereira.

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ment of $35,000 was made to Pereira by the El Paso bank (R. 98).

In view of the foregoing showing of close cooperation between Brading and Pereira in carrying out their scheme to defraud, it is unthinkable that Pereira would have withheld from his inseparable associate in crime the intelligence that Mrs. Joyce had taken their bait and was selling her securities in California. The inference gains strong support from the fact that Pereira received a telegram from Fort Worth signed "Wilson", which extended the option until Mrs. Joyce's money arrived from California (R. 31, 83).[21]

These circumstances warrant the jury's inference that both petitioners knew that their plan would be incomplete without collection of the California check, and that this would have to be effected across state lines. In a similar case (*United States* v. *Leathers*, 135 F. 2d 507, 511–512) the Court of Appeals for the Second Circuit answered the contention of one of the appellants that he had not knowingly participated in the frauds as follows:

> It is reasonable to suppose that Thomas was unlikely to have been in such close

[21] The wire was sent from Fort Worth at a time when, as the record makes clear, Pereira, himself was in Roswell with his "wife", and could not have sent it (R. 31). In view of Brading's activity in connection with the E. J. Wilson arrangements (R. 108), and in view of his arrival at Roswell shortly thereafter (R. 34), it is impossible not to believe that he sent the wire.

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> cooperation with the other defendants without knowing what they were about and participating in their schemes. In any event his knowledge and participation were questions properly for the jury and there can be no merit in the contention that a verdict should have been directed for the appellant Thomas.

We submit that this verdict of the jury must be sustained, particularly since, as this Court has remarked, reviewing courts will take the view of the evidence "most favorable to the Government to support it." *Glasser* v. *United States,* 315 U. S. 60, 80; see also *United States* v. *Manton,* 107 F. 2d 834, 839 (C. A. 2); *Carlson* v. *United States,* 187 F. 2d 366, 370 (C. A. 10), certiorari denied, 341 U. S. 940.

CONCLUSION

The record shows that this case is not within the principle on which marital confidences are privileged.

The record also shows that the petitioners formulated a scheme to defraud, in pursuance of which they caused a letter to be mailed, across state lines, containing a check which they had obtained by fraud, and that at the time the check was presented for payment, both petitioners were fully aware that it would have to be thus transported by mail and across state lines.

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The judgment below should be affirmed.
Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY, III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOHN R. WILKINS,
HOWARD ADLER, JR.,
Attorneys.

OCTOBER 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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SUPREME COURT OF THE UNITED STATES

No. 50.—October Term, 1953.

Victor Emanuel Pereira and Eugene H. Brading, Petitioners, *v.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February 1, 1954.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The petitioners, Pereira and Brading, were convicted in the District Court for the Western District of Texas under three counts of an indictment charging violation of the mail fraud statute, 18 U. S. C. (Supp. V) § 1341, violation of the National Stolen Property Act, 18 U. S. C. (Supp. V) § 2314, and a conspiracy to commit the aforesaid substantive offenses, 18 U. S. C. (Supp. V) § 371. The Court of Appeals for the Fifth Circuit affirmed. 202 F. 2d 830. This Court granted certiorari to consider questions which are important to the proper administration of criminal justice in the federal courts. 345 U. S. 990.

On April 19, 1951, Mrs. Gertrude Joyce, a wealthy widow, fifty-six years old, and her younger half-sister, Miss Katherine Joyner, were accosted by the petitioner Brading as they were about to enter a hotel in El Paso, Texas. Mrs. Joyce and her sister had just arrived from their home in Roswell, New Mexico, and were preparing to register at the hotel. Brading identified himself, assisted them in parking their car, and invited them into the hotel bar to meet a friend of his. They accepted. The friend was petitioner Pereira, thirty-three years of age. After a few drinks, the men suggested that they all go to Juarez for dinner. The women accepted, and

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after dinner visited some night clubs with the petitioners. Pereira devoted himself to Mrs. Joyce, telling her that their meeting was an "epoch" in his life. He mentioned that he was getting a divorce. This same performance was repeated the following night. When Pereira said that he would like to return to Roswell with the women, Mrs. Joyce invited the two men to be her house guests, and they accepted. Pereira commenced to make love to Mrs. Joyce, and she responded to his attentions. On May 3, Pereira exhibited a telegram to Mrs. Joyce, in the presence of Brading and Miss Joyner, stating that his divorce would be granted on May 27, but that he would not receive his share of the property settlement, some $48,000, for a month.

Brading represented himself as a prosperous oil man, dealing in leases, and Pereira as the owner and operator of several profitable hotels. Brading then told Mrs. Joyce that Pereira was about to lose an opportunity to share in the profits of some excellent oil leases because of the delay in the divorce property settlement, and persuaded her to lend Pereira $5,000.

Pereira suggested that he and Mrs. Joyce take a trip together to "become better acquainted." He borrowed $1,000 from her to finance the trip. Brading joined them at Wichita Falls, and the three of them continued the trip together as far as Dallas. Pereira discussed his purported hotel business in Denver during this part of the trip. He stated that he was giving two hotels to his divorced wife, but intended to re-enter the hotel business in the fall. In the meantime, he was going to "play a little oil" with Brading. In Hot Springs, Arkansas, Pereira proposed marriage and was accepted. Brading reappeared on the scene, expressing great joy at the impending marriage. Pereira then told Brading, in the presence of Mrs. Joyce, that he would have to withdraw from further oil deals and get a hotel to assure himself of a steady income.

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Pereira and Mrs. Joyce were married May 25, 1951, in Kansas City, Missouri. While there, Pereira persuaded Mrs. Joyce to procure funds to enable him to complete an arrangement to purchase a Cadillac through a friend. She secured a check for $6,956.55 from her Los Angeles broker, and drawn on a California bank, which she endorsed over to Pereira. The price of the car was $4,750, and she instructed Pereira to return the balance of the proceeds of the check to her. He kept the change.

From that time on, Pereira and Brading, in the presence of Mrs. Joyce, discussed a hotel which by words and conduct they represented that Pereira was to buy in Greenville, Texas. They took Mrs. Joyce—by this time Mrs. Pereira—to see it, and exhibited an option for its purchase for $78,000 through a supposed broker, "E. J. Wilson." Pereira asked his then wife if she would join him in the hotel venture and advance $35,000 toward the purchase price of $78,000. She agreed. It was then agreed, between her and Pereira, that she would sell some securities that she possessed in Los Angeles, and bank the money in a bank of his choosing in El Paso. On June 15, she received the check for $35,000 on the Citizens National Bank of Los Angeles from her brokers in Los Angeles, and gave it to Pereira, who endorsed it for collection to the State National Bank of El Paso. The check cleared, and on June 18, a cashier's check for $35,000 was drawn in favor of Pereira.

At five o'clock in the morning of June 19, Pereira and Brading, after telling their victim that they were driving the Cadillac to a neighboring town to sign some oil leases, left her at home in Roswell, New Mexico, promising to return by noon. Instead Pereira picked up the check for $35,000 at the El Paso Bank, cashed it there, and with Brading left with the money and the Cadillac.

That was the last Mrs. Joyce saw of either petitioner, or of her money, until the trial some seven months later. She divorced Pereira on November 16, 1951.

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The record clearly shows that Brading was not an oil man; that Pereira was not a hotel owner; that there was no divorce or property settlement pending in Denver; that Pereira arranged to have the telegram concerning the divorce sent to him by a friend in Denver; that there were no oil leases; that the hotel deal was wholly fictitious; and that "E. J. Wilson" was the petitioner Brading. The only true statements which the petitioners made concerned the purchase of the Cadillac, and they took that with them. Pereira and Brading contrived all of the papers used to lend an air of authenticity to their deals. In short, their activities followed the familiar pattern of the "confidence game."

The petitioners challenge the admissibility of Mrs. Joyce's testimony as being based on confidential communications between Mrs. Joyce and Pereira during the marriage. Petitioners do not now contend that Mrs. Joyce was not a competent witness against her ex-husband. They concede that the divorce removed any bar of incompetency. That is the generally accepted rule. Wigmore, Evidence, § 2237; 58 Am. Jur., Witnesses, § 204. Petitioners rely on the proposition that while divorce removes the bar of incompetency, it does not terminate the privilege for confidential marital communications. Wigmore, Evidence, § 2341 (2); 58 Am. Jur., Witnesses, § 379. This is a correct statement of the rule, but it is inapplicable to bar the communications involved in this case, since under the facts of the case, it cannot be said that these communications were confidential. Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts showing that they were not intended to be private. *Blau* v. *United States*, 340 U. S. 332; *Wolfle* v. *United States*, 291 U. S. 7. The presence of a third party negatives the presumption of privacy. Wigmore, Evidence, § 2336. So too, the intention that the information con-

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veyed be transmitted to a third person. *Id.*, § 2336. The privilege, generally, extends only to utterances, and not to acts. *Id.*, § 2337. A review of Mrs. Joyce's testimony reveals that it involved primarily statements made in the presence of Brading or Miss Joyner, or both, acts of Pereira which did not amount to communications, trips taken with third parties, and her own acts. Much of her testimony related to matters occurring prior to the marriage. Any residuum which may have been intended to be confidential was so slight as to be immaterial. Cf. *United States* v. *Mitchell*, 137 F. 2d 1006, 1009.

The court below was not in error in admitting Mrs. Joyce's testimony.

The petitioners challenge their conviction on the substantive counts on the ground that there was no evidence of any mailing or of transporting stolen property interstate, the gist of the respective offenses. These contentions are without merit.

The mail fraud statute provides:

> "§ 1341. Frauds and swindles
>
> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or

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knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U. S. C. (Supp. V) § 1341.

The National Stolen Property Act provides:

"§ 2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . ." 18 U. S. C. (Supp. V) § 2314.

To constitute a violation of these provisions, it is not necessary to show that petitioners actually mailed or transported anything themselves; it is sufficient if they caused it to be done. 18 U. S. C. (Supp. V) § 2 (b).

Petitioners do not deny that the proof offered establishes that they planned to defraud Mrs. Joyce. Collecting the proceeds of the check was an essential part of that scheme. For this purpose, Pereira delivered the check drawn on a Los Angeles bank to the El Paso bank. There was substantial evidence to show that the check was mailed from Texas to California, in the ordinary course of business.

The elements of the offense of mail fraud under 18 U. S. C. (Supp. V) § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential

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element. *United States* v. *Young*, 232 U. S. 155. Here, the scheme to defraud is established, and the mailing of the check by the bank, incident to an essential part of the scheme, is established. There remains only the question whether Pereira "caused" the mailing. That question is easily answered. Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used. *United States* v. *Kenofskey*, 243 U. S. 440. The conclusion that Pereira's conviction under this count was proper follows naturally from these factors.

As to the charge of causing stolen property to be transported in interstate commerce, the validity of Pereira's conviction is even more apparent. Sections 1341 and 2314 of Title 18 constitute two separate offenses, and a defendant may be convicted of both even though the charges arise from a single act or series of acts, so long as each requires the proof of a fact not essential to the other. *Gavieres* v. *United States*, 220 U. S. 338; *Blockburger* v. *United States*, 284 U. S. 299. 18 U. S. C. (Supp. V) § 2314 requires (1) knowledge that certain property has been stolen or obtained by fraud, and (2) transporting it, or causing it to be transported in interstate commerce. It is obvious that the mail fraud offense requires different proof. The transporting charge does not require proof that any specific means of transporting were used, or that the acts were done pursuant to a scheme to defraud, as is required for the mail fraud charge. *United States* v. *Sheridan*, 329 U. S. 379. When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso bank for collection, he "caused" it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira intended the El Paso bank to

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send this check across state lines. *United States* v. *Sheridan, supra,* at 391. The trial court charged the jury that one who "aids, abets, counsels, commands, induces, or procures" the commission of an act is as responsible for that act as if he had directly committed the act himself. See 18 U. S. C. (Supp. V) § 2 (a). *Nye & Nissen* v. *United States,* 336 U. S. 613. The jury found Brading guilty in the light of this instruction. The Court of Appeals affirmed on the ground that the evidence supported conviction under this charge.*

The evidence is clear and convincing that Brading was a participant in the fraud from beginning to end. Brading made the initial contact with the victim. He persuaded her to part with $5,000, as a loan to Pereira for investment in some nonexistent oil leases. He was present and participated in conversations about buying the hotel lease. He engaged a telephone answering service under the name of "E. J. Wilson," the name of Pereira's purported broker. The evidence established that he sent a telegram to Pereira authorizing an extension of the supposed option to purchase the hotel, signing it "E. J. Wilson." He supplied the false excuse for Pereira's departure from the victim, and went with Pereira to collect the proceeds of the check. He and Pereira fled together with the money.

The "aiding and abetting" instruction entitled the jury to draw inferences supplying any lack of evidence directly

*The Government argues that Brading's conviction on the substantive offenses can be affirmed on the basis of *Pinkerton* v. *United States,* 328 U. S. 640, since the record demonstrates that he conspired to defraud Mrs. Joyce and the acts charged in the substantive offenses were acts in furtherance of that design. The *Pinkerton* case, however, is inapplicable here since the jury was not instructed in terms of that theory. *Nye & Nissen* v. *United States,* 336 U. S. 613.

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connecting the petitioner Brading with the specific acts charged in the indictment from the abundant circumstantial evidence offered. The jury was properly charged on this theory. There is ample evidence of the petitioners' collaboration and close cooperation in the fraud from which the jury could conclude that Brading aided, abetted, or counseled Pereira in the commission of the specific acts charged. See *Nye & Nissen* v. *United States, supra,* at 619. The Court of Appeals has passed on the sufficiency of the evidence to sustain Brading's conviction on this theory. We see no reason to upset the findings of the courts below.

The petitioners allege that their conviction on both the substantive counts and a conspiracy to commit the crimes charged in the substantive counts constitutes double jeopardy. It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. See *Pinkerton* v. *United States,* 328 U. S. 640, 643–644, and cases cited therein. Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy. Cf. *Gavieres* v. *United States,* 220 U. S. 338. The substantive offenses with which petitioners were charged do not require more than one person for their commission; either could be accomplished by a single individual. The essence of the conspiracy charge is an agreement to use the mails to defraud and/or to transport in interstate commerce property known to have been obtained by fraud. Pereira's conviction on the substantive counts does not depend on any agreement, he being the principal actor. Similarly, Brading's conviction does not turn on the agreement. Aiding, abetting, and counseling are not terms which presuppose the existence of an agreement. Those terms

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have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy. *Nye & Nissen* v. *United States, supra,* at 620. Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical, any more than the two substantive offenses are identical.

Petitioners further contend that there was no evidence that they *agreed* to use the mails in furtherance of the scheme to defraud Mrs. Joyce or that they *agreed* to transport stolen property in interstate commerce. It is not necessary that an agreement to use the mails or transport stolen property exist from the inception of the scheme to defraud. If there was such an agreement at any time, it is sufficient. The existence of a conspiracy to defraud Mrs. Joyce is not denied. Pereira obtained a check from the victim for the purchase of an automobile. That check was drawn on a Los Angeles bank by Mrs. Joyce's brokers. When the subject of purchasing the hotel was broached, Mrs. Joyce told Pereira that she would have to have her California broker sell some stocks to obtain the funds for the purchase. When there was a delay in contacting the broker, Brading, as "E. J. Wilson," sent a telegram extending the spurious option for the purchase of the hotel. There is no doubt about Pereira's knowledge that a check on an out-of-state bank would be involved. From what we have said with regard to the substantive offenses, it is also clear that an intent to collect on the check would include an intent to use the mails or to transport the check in interstate commerce. It was certainly not improper to allow the jury to determine from the circumstances whether Brading shared Pereira's knowledge and

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agreed with him as to the use of the only appropriate means of collecting the money. It would be unreasonable to suppose that Brading would be so closely associated with Pereira in the scheme to defraud without knowing the details related to the realization of their common goal. There is no reason for this Court to upset the jury's finding of conspiracy.

For the foregoing reasons, the judgment below is

Affirmed.

MR. JUSTICE REED took no part in the consideration or decision of this case.

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SUPREME COURT OF THE UNITED STATES

No. 50.—October Term, 1953.

Victor Emanuel Pereira and Eugene H. Brading, Petitioners, *v.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February 1, 1954.]

Mr. Justice Minton, with whom Mr. Justice Black and Mr. Justice Douglas join, concurring in part and dissenting in part.

That a monumental fraud was perpetrated by the petitioners on Mrs. Joyce in the true fashion of a confidence game cannot be disputed. Such fraud could be punished by the States. For the United States to take cognizance of the offenses, the mails had to be used to carry out the fraud or the check fraudulently obtained must have been carried across state lines. That is what the Government charged. Count one charged that they caused a letter to be mailed from El Paso, Texas, to Los Angeles, California, on June 15, 1951. Count ten charged that on or about the same date they caused the check, in the amount of $35,286.78, to be transported in interstate commerce from El Paso to Los Angeles, knowing it was obtained by fraud. Count 11 charged a conspiracy to commit the substantive offenses.

I would affirm the convictions except as to Brading on the substantive counts. To convict on the substantive counts, the petitioners must have actually used the mails to transport the check from El Paso to Los Angeles. The use may be proved by direct or circumstantial evidence, but it must be proved. Brading must have used, or must have known or from the facts and circumstances be rea-

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sonably expected to have known, that Pereira actually would use the mails. *United States* v. *Peoni,* 100 F. 2d, 401, 402. To be guilty of the conspiracy, Brading had only to reasonably anticipate that Pereira might use the mails, and if he did subsequently use them, then Brading is bound.

The elements of the offense under the Mail Fraud statute are (1) a scheme to defraud which (2) reasonably contemplates the use of the mails, and (3) use of the mails in furtherance of the plan. The National Stolen Property Act is violated if (1) one transports securities or money of the value of $5,000 or more in interstate commerce and (2) does so knowing they have been taken by fraud.

Concededly, Brading did not participate directly in the use of the mails to transport the thirty-five thousand dollar check from El Paso to Los Angeles. He can be convicted, if at all, only as an aider and abettor. *Nye & Nissen* v. *United States,* 336 U. S. 613, 618. There is no evidence to establish that he could reasonably have expected that the mails would be used in carrying out the scheme.

Three financial transactions are mentioned by the Court in its opinion. First, the $5,000 transaction. That all took place in Roswell, New Mexico, where Mrs. Joyce cashed a check on a Roswell bank and gave the proceeds to Pereira. No federal offense there. The Cadillac transaction was liquidated by a check received from Los Angeles by Mrs. Joyce and turned over to Pereira, who cashed it in Kansas City, Missouri. Brading was not shown to have known where this money came from, and, more important, it was not proved that that check was mailed, as was done in the case of the third check, for $35,286.78.

Mrs. Joyce arranged for this check, the only transaction upon which the convictions are based, by selling

securities in Los Angeles. She received the check and turned it over to Pereira in Roswell, New Mexico, from whence he took it to El Paso, and there, on June 15, 1951, after securing Mrs. Joyce's endorsement, caused it to be sent through the mails for collection. The evidence does not show where Brading was at the time these events occurred. He next appeared at Mrs. Joyce's home in Roswell after the completion of the acts constituting the federal crimes, and on June 19, 1951, left with Pereira, ostensibly to see about some oil leases in Texas. The same day Pereira collected the money at the El Paso bank. There is no direct evidence that Brading actually knew or had reason to believe that a check would be received or that the check would be drawn on an out-of-town bank, necessitating its being placed in the mails for collection.

Lacking such proof, an important element of each crime charged, namely, that Brading had reason to foresee the use of the mails or interstate commerce, has not been established. It is true that the use of the mails need not have been originally intended as a part of the plan, but its use must have been a natural, reasonably foreseeable means of executing the plan. Brading might well have assumed that cash would be given to Pereira, or, if a check, one drawn on a local bank.

It may well be reasonable to infer that one receiving a check drawn on an out-of-town bank would know that it would be mailed in the process of collection, but to that inference must be added the inference that Brading had reason to know that a check would be received and also that the check would be on an out-of-town bank. This is piling inference upon inference, in the absence of direct proof. In short, this is simply guessing Brading into the federal penitentiary. It may be good guessing, but it is not proof.

Brading is clearly an aider and abettor of the scheme to defraud, which a State may punish, but is he an aider and abettor of the federal offenses of using the mails to defraud and causing the fraudulent check to be carried across state lines? I think not, unless we are willing to say that aiding and abetting the scheme to defraud is aiding and abetting any means used for the consummation of the fraud. Brading must aid and abet the federal crimes, not just the fraudulent scheme. There is not a scintilla of evidence that Brading aided and abetted anything more than the scheme to get the money from Mrs. Joyce.

In *Bollenbach* v. *United States*, 326 U. S. 607, the defendant was charged with transporting securities in interstate commerce knowing them to have been stolen, and with conspiracy to commit the offense. He was convicted of conspiracy. The court had instructed the jury that possession of the securities by the defendant in New York soon after their theft in Minnesota was sufficient to warrant the jury in finding that the defendant knew the securities had been stolen, and this would support the further "presumption" that the defendant was the thief and transported the securities in interstate commerce. This Court set the conviction aside. The latter inference was said to be untenable.

In this case, I think it untenable to infer that Brading had reason to know that Pereira would get a foreign check that must be sent through the mails and in its handling must be carried across state lines, thereby making out the federal crimes. It is untenable because it is unreasonable to infer one or more facts from the inference of another fact. *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480, 488; *United States* v. *Ross*, 92 U. S. 281.

END OF CASE